1244-568

RECORD, CASE No. 13,340.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 257.

THE UNITED STATES EX REL. JOSEPH E. JONES, PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF MACON COUNTY AND THE JUDGES THEREOF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 16, 1888.

RECORD, CASE No. 13,340.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 257.

THE UNITED STATES EX REL. JOSEPH E. JONES, PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF MACON COUNTY AND THE JUDGES THEREOF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Return to writ of error	*b*	1
Caption	1	2
Order filing transcript from western district	1	2
Transcript from circuit court of the United States, western district of Missouri	2	2
Order for alternative writ of mandamus	2	3
Order filing return to alternative writ of mandamus	3	3
Order to transfer cause to eastern district	4	3
Clerk's certificate	4	4
Information	6	4
Alternative writ of mandamus	8	5
Marshal's return	12	7
Return to alternative writ of mandamus	13	7
Stipulation to transfer cause to eastern district	26	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1891.

	Original.	Print.
Order filing replication	27	13
Replication	27	14
Order filing stipulation	31	15
Stipulation waiving jury and as to facts	32	15
Order filing brief of plaintiff	33	16
Order taking cause under advisement	35	16
Order filing brief of plaintiff	35	16
Order filing brief of defendant	36	17
Order filing reply brief of plaintiff	36	17
Opinion of the court	37	18
Judgment	40	19
Order filing petition for writ of error	41	19
Petition for writ of error	41	20
Order allowing writ of error, &c.	42	20
Citation (copy)	44	21
Marshal's return	45	21
Clerk's certificate	46	22
Assignment of errors	47	22

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern division of the eastern judicial district of Missouri, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the May term, 1888, thereof, between United States *ex rel.* Joseph E. Jones, relator, and The County Court of Macon County and The Judges Thereof, respondents, a manifest error hath happened, to the great damage of the said relator, as by — complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court, Northern Division of the Eastern Judicial District of Missouri.

Witness the Honorable Samuel F. Miller, presiding associate justice of the Supreme Court of the United States, this eighteenth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Issued at office, in the city of Hannibal, with the seal of the circuit court of the United States for the northern division of the eastern judicial district of Missouri, dated as aforesaid.

GEO. C. MOORE,
Clerk Circuit Court United States,
Northern Division of the Eastern Judicial District of Missouri,
By —— ——, *Deputy.*

Allowed by—
AMOS M. THAYER, *Judge.*

b [Endorsed:] No. 17. United States circuit court, eastern division of the eastern judicial district of Missouri. United States *ex rel.* Joseph E. Jones, relator, pl'ff, *vs.* The County Court of Macon County and the Judges Thereof, respondents, def'ts. Writ of error to the circuit court of the United States, northern division, eastern judicial district of Missouri. Returned and filed 11th day of Sept., 1888. Geo. C. Moore, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Northern Division of the Eastern Judicial District of Missouri, } ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal of the United States Circuit Court, Northern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of Hannibal, this 4th day of October, A. D. 1888.

GEO. C. MOORE,
Clerk of said Court.

1 UNITED STATES OF AMERICA,
Northern Division, Eastern Judicial District of Missouri, } ss:

Be it remembered that on the 9th day of January, A. D. 1888, and in vacation of the November term, 1887, of the United States circuit court in and for the northern division of the eastern judicial district of Missouri, the following appears of record, to wit:

Filing Transcript, &c.

UNITED STATES *ex Rel.* JOSEPH E. JONES Relator, Plaintiff,
vs.
MACON CO. COURT, Respondent, Defendant. } 17.

At this day is received from the clerk of the central division of the western judicial district of Missouri the following papers in the above-entitled cause, which are duly filed, to wit, "petition for mandamus," "pracepe for summons," "order for alternative writ of mandamus," "alternative writ of mandamus," "return," "stipulation to remove and transfer cause," "power of attorney to Sanders & Bowers," "abstract of costs," "transcript of orders and record entries," said cause being transferred from the central divis-
2 ion of the western judicial district of Missouri to the northern division of the eastern judicial district of Missouri.

Which said transcript is in words and figures, to wit:

Transcript.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, in Vacation.

FRIDAY, *November* 4, 1887.

JOSEPH E. JONES, Rel.,
vs.
MACON CO. COURT. } (2038.)

This day comes the relator and files his information for mandamus herein.

In Vacation.

SATURDAY, *November* 12, 1887.

This day the following order was received and filed herein, viz:

Order upon Information.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, at Chambers.

KANSAS CITY, MO., *Nov.* 11, 1887.

JOSEPH E. JONES, Relator,
vs.
Marion CO. COURT, Respondents. } (2038.)

This day comes the relator, by his attorneys, and presents
3 to the undersigned judge, at his chambers, the information for a writ of mandamus against said respondents in the above-entitled cause, as in said information prayed; on consideration whereof it is ordered that an alternative writ of mandamus be issued herein, returnable on the first Monday of December next, directed to the county court of Macon county, Missouri, and the justices thereof, commanding them forthwith to levy a special tax upon all property in Macon county made taxable by law for county purposes and upon the actual capital that all merchants and grocers and all business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to apply the same to the payment and discharge of said judgment in the information mentioned and described.

(Signed) A. KREKEL, *Judge.*

Filing of Return.

In Vacation.

MONDAY, *December* 5, 1887,

JOSEPH E. JONES, Rel.,
vs.
MACON COUNTY COURT *et al.* } (2038.)

This day comes the respondents and file their return herein to the alternative writ of mandamus heretofore issued in this
4 case and served upon them.

Filing of Stipulation to Remove and Order.

In Vacation.

SATURDAY, *December* 10, 1887.

JOSEPH E. JONES, Rel.,
vs.
MACON CO. COURT. } (2038.)

This day there is received and filed herein a stipulation of coun-

sel to transfer this case to the northern division of the eastern judicial district of the State of Missouri. It is thereupon ordered by the Honorable Amon M. Thayer, district judge, that the clerk of this court make a duly certified transcript of all record entries in this court in this cause and transmit the same, together with the papers filed herein, to the clerk of the circuit court of the United States for the northern division of the eastern judicial district of the State of Missouri.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for the central division of said district, do hereby cer-
5 tify that the foregoing writing is a true transcript of all the orders and record entries in the cause entitled Joseph E. Jones, rel., *vs.* Macon County Court (No. 2038) as fully as the same remain of record in my office, and I further certify that the papers herein sent are all which are on file in said court belonging to said cause.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the
[L. S.] city of Jefferson, in said district, this 6th day of January, 1888.

H. C. GEISBERG, *Clerk.*

6 Which said information is in words and figures as follows, to wit:

Information.

UNITED STATES OF AMERICA,
Central Division, Western District of Missouri, } *sct:*

To the honorable judges of circuit court of the United States in and for said district:

Now comes Joseph E. Jones and relates to the court that he is a citizen of the State of Pennsylvania, and that the county of Macon is a county of the State of Missouri, whose financial affairs are managed by a county court, composed of judges who are citizens of said State; that on the 25th day of November, 1884, relator recovered in the circuit court of the United States in and for the western district of Missouri a judgment against the said county of Macon for the sum of eight thousand nine hundred seventy-four and $\frac{39}{100}$ dollars ($8,974.39), part whereof, viz., the sum of seven hundred seventy-four and $\frac{30}{100}$ dollars, bears interest at the rate of seven per cent. per annum, and the remainder, viz., the sum of eight thousand two hundred an- $\frac{9}{100}$ dollars, bears interest at the rate of six per cent. per annum, together with costs, taxed at $59.70; that said judgment was recovered upon bonds and coupons issued by the said county in part
7 payment of a subscription made by the said county on the 9th day of February, 1869, to the capital stock of the Missouri

and Mississippi Railroad Company, duly organized under the laws of the State of Missouri; that said subscription was authorized by and issued under the 17th section of chapter 63 of the General Statutes of the State of Missouri of 1866, then in force; that relator has requested the said county court and the justices thereof to levy a special tax upon all property in said county made taxable by law for county purposes and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment; that the said county court and the justices thereof have refused and neglected to levy the said tax; that the said county has no property out of which the said judgment can be levied, and that relator has no other adequate remedy at law.

Wherefore relator prays the court to order that a writ of mandamus be issued, directed to the said county court of Macon county and the justices thereof, commanding them forthwith to levy a special tax upon all property in Macon county made taxable by law for county purposes and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment.

8

JOSEPH E. JONES,
By SANDERS & BOWERS,
His Attorneys.

I, George A. Sanders, on oath state that I am one of the attorneys for the relator herein, and that the matters and things alleged in above information are true, as I verily believe.

GEO. A. SANDERS.

STATE OF ILLINOIS, }
Sangamon County, } *ss:*

The above affidavit was subscribed and sworn to before me this 9th day of November, A. D. 1887, by the above-named Geo. A. Sanders.

[L. S. NOTARY PUBLIC.] WM. R. BOWERS,
Notary Public.

Which said alternative writ of mandamus is in words and figures as follows, to wit:

Alternative Writ.

CENTRAL DIVISION OF THE
WESTERN DISTRICT OF MISSOURI, *sct:*

9 The President of the United States of America to The County Court of Macon County and the Justices Thereof, Greeting:

Whereas it has been represented to our circuit court of the United

States for the central division of the western district of Missouri that Joseph E. Jones is a citizen of the State of Pennsylvania; that the county of Macon is a county of the State of Missouri, whose financial affairs are managed by a county court composed of judges who are citizens of said State; that on the 25th day of November, 1884, the said Jones, relator herein, recovered in the circuit court of the United States for the western district of Missouri a judgment against the said county of Macon for the sum of eight thousand nine hundred and seventy-four and $\frac{39}{100}$ dollars ($8,974.39), part whereof, viz., the sum $774.30, bears interest at seven per cent. per annum, and the remainder, viz., $8,200.09, bears interest at the rate of six per cent. per annum, together with the costs, taxed at $59.70; that said judgment was recovered upon bonds and coupons issued by said county in part payment of a subscription made by
10 the said county on the 9th day of February, 1869, to the capital stock of the Missouri and Mississippi Railroad Company, duly organized under the laws of the State of Missouri; that said subscription was authorized by and issued under the 17th section of chapter 63 of the General Statutes of the State of Missouri of 1866, then in force; that relator has requested the said county court and the justices thereof to levy a special tax upon all property in said county mad- taxable by law for county purposes and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment; that the said county court and the justices thereof have refused and neglected to levy said tax; that the said county has no property out of which the said judgment can be levied, and that relator has no other adequate remedy at law:

Now, therefore, you, The County Court of Macon County
11 and the Justices Thereof, are hereby commanded forthwith to levy a special tax upon all property in Macon county made taxable by law for county purposes and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to apply the same to the payment and discharge of said judgment, interest and costs, and costs of this proceeding (indorsed on the writ) or show cause on the first Monday of December next why you have refused so to do; and have then and there this writ with your return thereon.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of November, 1887.

Issued at office, in the city of Jefferson, in said district,
[L. S.] under the seal of said circuit court the day and year last aforesaid.

H. C. GEISBERG, *Clerk.*

12 On the back of said writ is the following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, Northern Division.

I hereby certify that I have executed this writ on the 19th day of November, A. D. 1887, by delivering a certified copy of same to J. B. Gooding, county clerk of Macon county, at his office, in Macon City, Macon county, in above district.

PHŒBE W. COUZINS.
C. F. WILLIAMS, *Deputy.*

1 service	$2 00
170 miles	10 20
	$12 20

13 And the respondents' return thereto is in words and figures, to wit:

Return.

In the Circuit Court of the United States, Central Division of the Western Judicial District of Missouri, November Term, 1887.

THE UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator,
vs.
MACON COUNTY COURT and THE JUSTICES THEREOF, Respondents.
No. 2038. Return.

Now, at this day, comes William H. Terrell, Charles R. Perry, and Thomas J. Singleton, the judges of the county court of Macon county, Missouri, and respondents herein, and for return to the alternative writ of mandamus or so much thereof as they are advised it is material for them to answer say—

They admit that relator is a citizen of the State of Pennsylvania, as in the writ alleged; that Macon county is a municipal corporation whose financial affairs are administered as in said writ alleged, and is a citizen of the State of Missouri; that on the 25th day of November, 1884, relator recovered in this court against Macon county a judgment for $8,974.39, of which judgment $774.30
14 bears interest at the rate of seven per cent., and the remainder, to wit, $8,200.09, at six per cent., and that said judgment is unpaid.

But respondents deny that said judgment was rendered on bonds and coupons or on bonds or coupons issued by Macon county under and pursuant to section seventeen of chapter 63 of the General Statutes of Missouri of 1866, as in said writ alleged, or under and pursuant to any other general statutes of Missouri; but respondents aver and charge the fact to be that said judgment of relator, obtained as aforesaid, was based upon coupons detached from bonds issued by said Macon county in payment of subscriptions to the capital stock of the Missouri and Mississippi Railroad Company, made by the county court of said county of Macon, as hereinafter

more fully set out, under and pursuant to the provisions of the 13th section of an act of the General Assembly of the State of Missouri entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, and without any other right, power, or authority whatever.

And for further return respondents allege that under and by virtue of the said act of the General Assembly of the State of Missouri before mentioned the corporation therein named was
15 on the — day of September, 1866, organized and accepted the provisions of said act, and thereby became a body corporate; that at the time of the making of said subscriptions to the capital stock of said railroad company and the issuing of bonds, with interest coupons attached thereto, in payment of said subscriptions, Macon county nor the county court thereof nor any officer or agent thereof, under the constitution, laws, or general statutes of the State of Missouri, had any right, power, or authority to make said subscriptions and issue said bonds and interest coupons without the assent of two-thirds of the qualified voters of said county voting at a general or special election held in said county for the purpose of obtaining said assent, except the authority conferred on the county court of said county by said 13th section of said act of February 20th, 1865, so as aforesaid chartering said Missouri and Mississippi Railroad Company; which said section is in words and figures as follows, to wit:

"§ 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year."

That under and by virtue of the authority conferred upon
16 the county court of Macon county by said section 13 and by no other right, power, or authority whatever the county court of Macon county on the 2nd day of April, 1867, subscribed on behalf of said Macon county the sum of $175,000 to the capital stock of the said Missouri and Mississippi Railroad Company and from time to time, as required by said railroad company, up to the 1st day of January, 1870, issued the bonds of the said county in various denominations, with interest coupons attached, to the aggregate sum of $175,000 in payment of said subscription, said bonds and coupons being payable at the banking-house of Lewis Barthalow & Co., in St. Louis, Mo.

That said subscription was so made and said bonds and coupons were so issued without the assent of two-thirds of the qualified voters of Macon county, no election, regular or special, having at any time been held in said county for the purpose of obtaining such assent; but, on the contrary, said subscription was so made and said bonds and coupons were so issued by said Macon county court against the wishes of nine-tenths of the qualified voters of Macon county.

That said judgment of relator is based in part upon fifteen in-

terest coupons detached from the bonds so as aforesaid issued, of the face value of $1,050.

That it is recited on the face of said bonds that they were
17 issued under and pursuant to orders of the county court of Macon county, as authorized by said act of the General Assembly of the State of Missouri, approved February 20th, 1865, as it is alleged in the declaration and petition of the relator filed in this court on which relator's said judgment was rendered, and that the only part of — act which confers any authority whatever upon the county court of Macon county to make said subscription and to issue said bonds and coupons is the said 13th section thereof, hereinbefore recited and set out, and that neither the said county court nor any other officer or agent of said county had any authority whatever to make said subscription or issue said bonds and coupons save and except the authority so conferred by said 13th section of said act.

That under and by virtue of the authority conferred by the said 13th section of said act and by no other right, power, or authority whatever the said county court of Macon county on the 2nd day of May, 1870, made another and further subscription on behalf of said Macon county to the capital stock of the said Missouri and Mississippi Railroad Company in the sum of $175,000 and issued bonds in the sum of $1,000 each to said company for the aggregate amount of $175,000 in payment of said subscription. Said bonds were dated
the 2nd day of May, 1870, with interest coupons attached, the
18 rate of interest 8 per cent. per annum, interest payable semi-annually, and said bonds were payable twenty years after date, principal and interest being payable at the Bank of Commerce, in the city of New York.

That said subscription was so made and said bonds and coupons were so issued without the assent of two-thirds of the qualified voters of Macon county, no election, regular or special, having at any time been held in said conuty for the purpose of obtaining said assent; but, on the contrary, said subscription was so made and said bonds and coupons were so issued by Macon county court against the wishes of nine-tenths of the qualified voters of Macon county.

That the judgment in favor of the relator was recovered in part on coupons detached from a portion of said bonds so as aforesaid issued by said Macon county court in payment of said last-mentioned subscription to said Missouri and Mississippi Railroad Company as aforesaid, to wit, on 139 coupons of the face value of $40.00 each and of the aggregate value of $5,560.

That it is recited in the face of each of said bonds that they were issued under and pursuant to the order of the county court of Macon county as authorized by said act of the General Assembly of the State of Missouri, approved February 20th, 1865, so as aforesaid
incorporating said Missouri and Mississippi Railroad Com-
19 pany, as alleged in relator's declaration and petition filed in this court, and on which his said judgment was rendered, and the only part of said act which confers any authority upon the Macon county court to make said subscription and issue said bonds

and coupons is the said 13th section thereof, which is hereinbefore set out and recited.

That neither the county court of Macon county nor any officer or agent thereof had any authority to make such subscriptions or issue said bonds and coupons save and except the authority which is conferred upon Macon county court by said 13th section of said act.

That said subscriptions were made, said debts were made, and said bonds and said coupons were issued by Macon county to said Missouri and Mississippi Railroad Company as aforesaid with express reference to payment only out of the money to be derived from the levy of a special tax of one-twentieth of one per cent. each year upon the assessed value of all the taxable property of Macon county; that Macon county court at the times of making said subscriptions and issuing said bonds and coupons had no authority and it has no authority now to levy any other tax than said special tax of one-twentieth of one per cent. to pay said bonds and coupons.

20 That under and — virtue of the 13th section of said act, which is hereinbefore recited, the county court of Macon county has each and every year since the issuing of said bonds and coupons as aforesaid levied a special tax of one-twentieth of one per cent. upon the assessed value of all the taxable property in said county, and caused the same to be extended on the tax books of said county for each year, and had such special tax collected for the purpose of paying said bonds and coupons.

That the aggregate valuation of all the taxable property of Macon county always has been and is now less than six millions of dollars.

That the constitution of the State of Missouri limits the power of the county court of Macon county in levying taxes for county purposes as follows:

"For county purposes the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed 50 cts. on the $100 valuation."

That at the time of issuing said bonds and coupons in payment of said subscriptions, as hereinbefore stated, the county court of Macon county was and ever since has been and still is limited in levying taxes for county purposes by the laws and statutes of

21 Missouri to one-half of one per cent. on the assessed value of the taxable property of said county.

That in and by virtue of said laws and statutes the county court of Macon county have levied each and every year since the issue of said bonds and coupons and still are levying and collecting said one-half of one per cent. upon all the taxable property of every kind in said county, and said one-half of one per cent. has been prudently and economically administered and applied according to law.

That these respondents, as judges of Macon county court, have no legal authority to levy any other or greater taxes than the taxes hereinbefore stated, but they aver and charge the fact to be that they have fully and completely exhausted all their power and authority, under the laws of Missouri, to levy and collect taxes and

have never at any time refused to levy and collect any tax or taxes that they legally and lawfully might levy and collect, and that they have no right, power, warrant, or authority under the laws of Missouri to levy and collect the tax directed in said alternative writ, or to levy and collect any other or further tax or taxes than those
22 in this return mentioned, which they have at all times levied and still are levying and collecting.

Therefore, having made full return to said alternative writ of mandamus and shown good, valid, legal reasons why they should not obey the commands thereof, they ask to be discharged with their costs incurred in making this return.

W. H. TERRELL,
Presiding Justice.
CHARLES R. PERRY,
T. J. SINGLETON,
Justices.
ROBERT G. MITCHELL,
Pros. Att'y Macon Co., and
BEN. ELI GUTHRIE &
B. R. DYSART, *Of Counsel.*

STATE OF MISSOURI, } ss :
County of Macon, }

This day personally appeared before the undersigned, clerk of the county court, William H. Terrell, Charles R. Perry, and Thomas J. Singleton, who, being by me first duly sworn according to law, depose and say that they have read and heard read the foregoing return, and that the matters and facts as herein stated are true according to the best of their knowledge and belief.

23

W. H. TERRELL.
CHARLES R. PERRY.
THOMAS J. SINGLETON.

Subscribed and sworn to before me this 2nd day of December, A. D. 1887.

In testimony whereof I have hereunto set my hand and affixed the seal of the county court of Macon county, Missouri.

[L. S.]

J. B. GOODDING,
Clerk of Macon County Court.

UNITED STATES *ex Rel.* JONES
vs.
MACON COUNTY COURT *et al.* } No. 2038.

And for further and additional return these respondents state that they have no power or authority whatever to collect or order or cause to be collected any tax or taxes in "money" as in said alternative writ directed, for that they say that under the laws and statutes of Missouri these respondents, as judges of the county court of Macon county, have no authority over the collector of taxes save and except to make, on receipts of the county treasurer, settlements

with him for taxes collected and turned over to said treasurer and allow him proper credit therefor, and they have now power
24 or authority to direct or order the collector of taxes to take or receive money or any other thing whatever in payment of taxes.

That at the time of making both said subscriptions and issuing all said bonds and coupons in payment thereof and both prior thereto and ever since the law and statutes of Missouri specifically direct what and what only the collector of taxes shall recover in payment of taxes, and the county court can give no direction whatever in the matter.

That at the time of making both said subscriptions and issuing all said bonds and coupons in payment thereof and both prior thereto and ever since the laws and statutes of Missouri authorized and required all collectors of any county revenue to receive all county warrants presented to him by the legal holder thereof in payment of any county revenue, license, tax, assessments, fine, penalty, or forfeiture existing against said holder and accruing to the county issuing said warrant, and the county court of Macon county has no power to make any order or direction in contravention of such statutes.

W. H. TERRELL,
Presiding Justice.
CHARLES R. PERRY,
25 THOMAS J. SINGLETON,
Justices.
ROB'T G. MITCHELL,
Pros. Att'y, &
BEN. ELI GUTHRIE &
B. R. DYSART, *Of Counsel.*

STATE OF MISSOURI, } *ss:*
County of Macon, }

This day personally appeared before the undersigned, clerk of the county court, William H. Terrill, who, being first duly sworn according to law, deposeth and says that he has read and heard read the foregoing additional return, and that the matters and facts as therein stated are true according to the best of his knowledge and belief.

W. H. TERRELL.

Subscribed and sworn to before me this the 3rd day of December, 1887.

Witness my hand and seal of said court. Done at office,
[L. S.] in Macon county, Missouri.

J. B. GOODDING,
Clerk of Macon County Court.

And the said stipulation to remove and transfer said cause
26 and the endorsement thereon *is* in words and figures, to wit:

Stipulation to Remove.

In the Circuit Court of the United States for the Central Division of the Western Judicial District of Missouri.

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator,
vs.
THE MACON COUNTY COURT and THE JUSTICES THEREOF, Respondents. } No. 2038.

Stipulation.

It is hereby agreed and stipulated by and between the relator and respondents and citizens of Macon county, Missouri, which county is, under the act of Congress of February 28th, 1887, in the northern division of the eastern judicial district of said State, this cause, as well as the cause out of which this mandamus proceeding grew and on the judgment of which it is based, shall be transferred to the court in said northern division of the eastern judicial district, and application is hereby made to the court for all proper orders to effectuate said transfer under the 4th section of said act of Congress.

ROBERT G. MITCHELL,
Attorney for Respondents.
SANDERS & BOWERS,
Attorneys for Relator.

27 Endorsed, to wit:
In pursuance of within stipulation clerk will enter an order in vacation for the transfer as herein stipulated. Amos M. Thayer, U. S. dist. judge. Dec. 8, '87.

Afterwards, to wit, on the 3rd day of March, 1888, and in vacation of the November term, 1887, of said court the following appears of record:

Filing of Replication.

JOSEPH E. JONES, Rel., Plaintiff,
vs.
MACON COUNTY, Defendant. } 17.

At this day comes the plaintiff, by Sanders and Bowers, attorneys, and files replication herein.
Which said replication is in words and figures, to wit:

Replication.

In the Circuit Court of the United States, Northern Division of the Eastern Judicial District of Missouri, November Term, 1887.

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator,
vs.
MACON COUNTY COURT and THE JUSTICES THEREOF, Respondents.
} Mandamus. No. 2038.

28 The relator, by way of answer to the return of the respondent-, denies each and every allegation thereof inconsistent with his petition, except that the relator admits that his said judgment is based upon coupons detached from bonds issued by said county of Macon in payment of a subscription to the capital stock of the Missouri and Mississippi R. R. Company made by the county court of said county under and pursuant to the provisions of the 13th section of an act of the General Assembly of the State of Missouri entitled "An act to incorporate the Missouri and Mississippi R. R. Company, approved February 20th, 1865."

Relator further admits that the county court of Macon county, under said 13th section of the Missouri and Mississippi railroad charter, on the 2nd day of April, 1867, subscribed on behalf of said county the sum of $175,000 to the capital stock of said county and issued bonds therefor from time to time, as required by said railroad company, up to the 1st day of January, 1870, which said bonds were in various denominations and payable at the banking-
29 house of Lewis Barthalow & Company, in St. Louis, Mo.

Relator further admits that said subscription was made without the consent of two-thirds of the qualified voters of Macon county.

Relator further admits that the said county court of Macon county, under and pursuant to the 13th section of the act incorporating the Missouri and Mississippi R. R. Company, on the 2nd day of May, 1870, made another and further subscription on behalf of said Macon county to the capital stock of the said Missouri and Mississippi R. R. Company in the sum of $175,000, and issued bonds in the sum of $1,000 each to the said company for the aggregate sum of $175,000 in payment of said subscription, which said bonds bear interest at the rate of 8 per cent. per annum, and were payable twenty years after date at the Bank of Commerce, in the city of New York.

That said subscription was made without the assent of two-thirds of the qualified voters of Macon county and without any election, either regular or special, having at any time been held in said county for the purpose of obtaining said assent.

30 Relator further admits that said 13th section of the act incorporating the Missouri and Mississippi R. R. Co. provides for the levy of a special tax of one-twentieth of one per cent. upon the assessed value of all taxable property in said county, and relator

neither admits nor denies "that the aggregate valuation of all the taxable property of Macon county always has been and now is less than $6,000,000, and that one-twentieth of one per cent. has always been regularly levied and collected and the same applied on the payment of interest of its bonded debt, and that if respondents' averment on this point is material strict proof of this averment is required."

Relator further admits that the present constitution of the State of Missouri limits the power of the county court of Macon county in levying taxes for county purposes to fifty cents on the $100 valuation.

But relator avers the fact to be that at the time of the issue of the bonds and coupons included in this judgment that county courts of the State of Missouri had a general power to audit and
31 settle all demands against the county and to levy such sums as were annually necessary to defray the expenses of the county, including judgments against it, as found in Wag. St., sec. 9, page 441, and sec. 165, page 1193.

Relator further avers that his judgment is a valid and binding debt of the county of Macon; that the county court had power to levy a tax to pay the debt when it was contracted, as found in the statutes above referred to, and that power has not been and could not be taken away so long as his debt, contracted while that law was in force, is unpaid.

SANDERS AND BOWERS,
For Relator.

Afterwards, to wit, on the 5th day of March, 1888, and during the regular November term, 1887, of said county, the following, among other, proceedings were had:

Filing of Stipulation.

JOSEPH E. JONES, Relator, Plaintiff,
vs.
THE COUNTY COURT OF MACON COUNTY, Defendant. } 17.

At this day come the parties, plaintiff and defendant, by their respective attorneys, and file stipulations, to wit:

32 *Stipulation.*

"In the Circuit Court of the United States, Northern Division, Eastern District of Missouri.

"UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator,
vs.
"THE COUNTY COURT OF MACON COUNTY, Respondent. } Stipulation.

"It is hereby agreed and s-ipulated by and between the parties to the above-entitled cause that this cause is submitted to the court on the pleadings and jury hereby waived.

"And it is furthur admitted that the assessed valuation of Macon

county has at no time reached six million dollars, but has at all times been less than that amount; that said county has every year since the year 1866 levied and collected one-twentieth ($\frac{1}{20}$) of one per cent. on the assessed valuation of all the taxable property of said county and has applied the same to the payment of the bonds issued under the act of Feb. 20th, 1865, chartering the Missouri & Mississippi Railroad Company, but no such payment has been made on any bonds or coupons in this suit.

"That relator files brief and agrees to furnish respondent
33 copy of same in ten days, and after service of such copy respondents shall have twenty days to file brief and relator has fifteen days to reply to such brief of respondent, each party to furnish the other copies of such briefs.

"That the proceeds of the said tax of one-twentieth of one per cent. *is* annually about twenty-five hundred dollars, and that the same *has* been absorbed by coupons, warrants issued on judgments rendered on bonds and coupons of said county issued under said act of February 20th, 1865, and that there are now registered against the fund arising from said tax warrants so issued to the amount of between forty and fifty thousand dollars.

"ROBERT G. MITCHELL,
"*Pros. Att'y for Macon County, Mo., &*
"BEN. ELI GUTHRIE &
"B. R. DYSART,
"*For Respondents.*

"SANDERS AND BOWERS,
"*For Relator.*"

Afterwards, to wit, on the same day, the following, among other, proceedings were had:

Filing of Relator's Brief.

JOSEPH E. JONES, Relator, Plaintiff,
vs.
MACON COUNTY COURT, Respondent, Defendant. } 17.

34 Now, at this day, comes the plaintiff, by his attorneys, and files brief and argument herein.

35 Afterward, to wit, on the same day and during the regular November term, 1887, of said court, the following, among other, proceedings were had:

Trial.

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator, Plaintiff,
vs.
MACON COUNTY COURT, Respondent, Defendant. } 17.

Now, at this day, comes the relator, by his attorneys, and also comes the respondent, by its attorneys, and this cause, coming on to

be heard, is submitted to the court, a jury being waived; upon the pleadings, testimony, and upon the stipulation hereinbefore filed and recorded, and said cause is by the court taken under advisement.

Afterwards, to wit, on the 9th day of March, 1888, and in vacation of the November term, 1887, of said court, the following appears of record:

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator, Plaintiff,
vs.
MACON COUNTY COURT, Respondent, Defendant.

At this day comes the relator, plaintiff, by his attorneys, and files brief and argument in this cause.

36 Afterward, on the 27th day of March, 1888, and in vacation of the November term, 1887, of said court, the following appears of record:

Filing Brief of Resp'd't.

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator, Plaintiff,
vs.
MACON COUNTY COURT, Respondent, Defendant. } 17.

At this day comes the respondent, defendant, by its attorneys, and files brief in duplicate in this cause.

Afterwards, to wit, on the 11th day of April, 1888, and in vacation of the November term, 1887, of said court, the following appears of record, to wit:

Filing Reply of Relator.

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator, Plaintiff,
vs.
MACON COUNTY COURT, Respondent, Defendant. } 17.

At this day comes the relator, plaintiff, by his attorney, and files reply to respondent's brief herein.

Afterward, on the 28th day of May, 1888, and during the regular May term, 1888, the following record was filed, to wit:

37 *Opinion of Court.*

In the Circuit Court of the United States for the Northern Division of the Eastern Judicial District of Missouri.

U. S. *ex Rel.* JOSEPH E. JONES
vs.
MACON COUNTY COURT and THE JUDGES THEREOF.

Sanders & Bowers, attorneys for relator; R. G. Mitchell, prosecuting attorney, and Guthrie & Dysart, attorneys for respondents.

MAY 28TH, 1888.

THAYER, *District Judge:*

This is a mandamus proceeding to compel the respondents to levy a special tax to pay a judgment recovered against Macon county in the central division of the western district of Missouri on November 25th, 1884, in the sum of $8,974.39.

The case has been submitted in this district on the pleadings and on a stipulation conceding certain facts.

It will suffice to say that from the pleadings and stipulation it appears that the judgment referred to was based on coupons of bonds issued by Macon county pursuant to power conferred by the 13th section of an act passed on February 20th, 1865, to encorporate the Missouri & Mississippi R. R.

38 That section (as is well known) authorized the issue of bonds without a popular vote, but limited the amount of the special tax that might be levied in any one year for their payment to $\frac{1}{20}$ of one per cent.

It is conceded that Macon county has thus far levied $\frac{1}{20}$ of one per cent. annually to meet the bonds that were issued under the act in question and that the proceeds of the tax have been properly applied to the payment of the interest on the bonds.

Upon this state of facts it is obvious that the case is controlled by the decision in the case of U. S. *ex rel.* Huidekoper *vs.* Macon County, 99 U. S., 589, and the peremptory writ prayed for must be refused. It was held in that case (following the general rule on the subject) that purchasers of municipal bonds are chargeable with notice of the statute under which they are issued.

It was furthermore held that if the statute under which bonds are issued limits the rate of special taxation for their payment the bondholder cannot by mandamus enforce the levy of a higher special tax.

That decision determines the present controversy.

In the case of The U. S. *vs.* Clark County, 96 U. S., 211, it was held that bonds issued under the 13th section of the act to incorporate the Missouri & Mississippi R. R. Co. are debts of the county

39 as fully as any other liabilities, and that for any balance due on the same after the special tax of $\frac{1}{20}$ of one per cent. is exhausted the holder is entitled to a warrant payable out of the funds of the county raised for general county expenses.

The application in this case, however, is not to obtain a warrant against the general fund, but to compel a special levy in addition to the rate prescribed by the statute under which the bonds were issued. The writ must, of course, be denied.

The relator's counsel seems to have been misled to some extent by the decison of this court in U. S. *ex rel.* Hill *vs.* Scotland County, 32 Fed. Rep., 714. In that case the court was dealing with a statute which authorized county courts to issue bonds, but did not limit the power of taxation for their payment. What was said in that case must be understood in its relation to such a statute as was then under consideration. That decision has no bearing on the present controversy.

The statute under which the bonds involved in this suit were issued required the bondholder to depend on the special tax of $\frac{1}{10}$ of one per cent. and the general county revenue for their payment.

A peremptory writ is denied and the proceeding is dismissed at relator's cost.

40 Afterwards, on the same day, and during the regular May term, 1888, of said court, the following, among other, proceedings were had, to wit:

Judgment.

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator,
vs.
MACON COUNTY COURT and THE JUDGES THEREOF, Respondents. } 17.

Now, at this day, comes the relator, by his attorneys, Sanders and Bowers, and also come the respondents, by their attorneys, R. G. Mitchell, prosecuting attorney, and Guthrie and Dysart, and this cause being called, having — submitted to the court at the last term on the pleadings and stipulations filed and by the court taken under advisement, and the court, being now fully advised of and concerning the premises, doth find for the respondents and refuses to grant a peremptory writ as prayed for and dismisses the proceedings at the cost of the relator. It is therefore considered, ordered, and adjudged by the court that the relator take nothing by his writ herein; that the respondents have and recover of the relator their costs in this behalf expended, and that hereof execution may issue therefor.

41 Afterwards, on the 18th day of June, 1888, and in vacation of the May term, 1888, of said court, the following appears of record:

Filing Application for Writ of Error.

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator,
vs
MACON COUNTY COURT and THE JUDGES THEREOF, Respondents. } 17.

Now, at this day, comes the relator, by Mess. Sanders & Bowers,

his attorneys, and file- petition or application for writ of error herein, which is in words and figures as follows, to wit:

Application for Writ of Error.

UNITED STATES OF AMERICA:

In the Circuit Court, Northern Division, Eastern Judicial District of Missouri, at May Term, A. D. 1888.

U. S. *ex Rel.* JOSEPH E. JONES
vs.
THE COUNTY COURT OF MACON COUNTY and THE JUDGES THEREOF, Respondents. } Mandamus.

And now comes the relator, by his attorneys, Sanders & Bowers, and excepts to the judgment rendered against him in the above-entitled cause on the 28th day of May, 1888, and prays that a writ of error may issue and that the questions involved in this
42 suit may be examined by the United States Supreme Court to the end that the said judgment and findings in this suit against the relator may be reversed.

Assignments of Error.

The court erred in not ordering the peremptory writ to issue as prayed for in relator's petition.

The court erred in refusing to grant the peremptory writ ordering the sufficient tax levy prayed for in relator's petition to pay his judgment and in discharging the respondents.

The court erred in rendering judgment against the relator for costs in the case and in favor of respondents.

SANDERS & BOWERS,
For Relators.

Afterwards, to wit, on the 11th day of September, 1888, and during the regular May term, 1888, of said court, the following proceeding-, among others, were had, to wit:

Hearing of Application, Order, and Approval of Bond.

UNITED STATES *ex Rel.* JOSEPH E. JONES, Relator, Plaintiff,
vs.
THE COUNTY COURT OF MACON COUNTY and THE JUDGES THEREOF, Respondents, Defendants. } 17.

43 Now, at this day, comes the relator, plaintiff, by his attorneys, Sanders and Bowers, and presents to the court his application for writ of error herein filed on June 18th, 1888, and the same being submitted, and the court, being duly advised, doth grant the prayer thereof and allows the writ of error prayed for to issue; and now said relator files and presents to the court his appeal bond in the sum of five hundred ($500) dollars, with George A. Sanders and Frank W. Tracy, as securities.

And said bond, being seen and duly examined by the court, is by the court approved; and now the court doth order that a citation issue to said respondents, citing and admonishing them to appear at a supreme court of the United States to be held at Washington on the second Monday in October, 1888, pursuant to writ of error filed in the clerk's office of the circuit court of the United States for the northern division of the eastern judicial district of Missouri, to show cause, if any there be, why the judgment rendered against said relator, plaintiff in error, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Which said citation and the return of the United States marshal thereon *is* in words and figures, to wit:

44 *Citation and Return.*

The United States of America to the county court of Macon county and the judges thereof, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern division of the eastern judicial district of Missouri, wherein United States *ex rel.* Joseph E. Jones, relator, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the circuit court of the United States for the eastern district of Missouri, this 11th day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

AMOS M. THAYER,
Judge United States District Court,
Eastern District of Missouri.

45 *Return.*

UNITED STATES OF AMERICA,
Northern Division of the Eastern Judicial District of Missouri, } *ss:*

Served the within citation in the northern division of the eastern judicial district of Missouri, at the city of Macon, county of Macon and State of Missouri, on the first day of October, A. D. 1888, by delivering a duly certified copy of the same to W. H. Terrell, C. R. Perry, and T. J. Singleton, judges of the county court of Macon county, Missouri, and by delivering a duly certified copy of the same to J. B. Goodding, clerk of the county court of said Macon county.

J. W. EMERSON,
United States Marshal, Eastern Judicial Dist. of Missouri,
By WM. R. KELLY,
Deputy Marshal.

46 UNITED STATES OF AMERICA,
Northern Division of the Eastern Judicial District of Missouri, } ss :

I, George C. Moore, clerk of the circuit court of the United States in and for the northern division of said district, do hereby certify that the foregoing writing is a full, true, and complete transcript of all the record and proceedings had in this court in the cause therein named as fully as the same remains on file and of record in my office.

Seal of the United States Circuit Court, Northern Division of the Eastern Judicial District of Missouri.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Hannibal, in said district, this 4th day of October, 1888.

GEO. C. MOORE, *Clerk.*

47 UNITED STATES *ex Rel.* JOSEPH E. JONES
vs.
MACON COUNTY COURT and THE JUSTICES THEREOF, STATE OF MO.

Assignments of Error.

First. The court erred in not granting the petition of the plaintiff for an error of court for a tax levy sufficient to pay the judgment of the plaintiff in full.

Second. The court erred in holding that the "one-twentieth of one per cent. rate of taxation mentioned in section 13 of the charter of the Missouri and Mississippi Railroad Company is the limit of the taxing power of the defendant to pay the judgment of the plaintiff.

Third. The court erred in refusing to grant the relief prayed by the plaintiff, to wit, a special tax levy sufficient to raise funds enough to pay the plaintiff's judgment in full, under any laws of the State of Missouri existing at the time the bonds and coupons on which the plaintiff's judgment was based were issued.

Fourth. The court erred in not ordering a special tax levy sufficient to pay plaintiff's judgment in full, under sections 17 and 18 of the general railroad law of the State of Missouri.

Fifth. The plaintiff is in law and equity entitled to the use of all legal means and the full power of the court to aid him to collect his judgment irrespective of any rates of taxation recited in the bonds upon which the judgment is based, and the court erred in refusing to order the tax levy prayed for in the petition.

Sixth. The court erred in refusing to grant the relief prayed for in plaintiff's petition and in giving judgment against the plaintiff for costs.

48 Seventh. The court erred in refusing to order the tax levy prayed for by the plaintiff sufficient to pay his judgment and in giving judgment for the defendants for costs.

Eighth. That the said judgment is contrary to the law in the case.

Ninth. That the said judgment is contrary to the law and the evidence in the case.

GEORGE A. SANDERS,
For Plaintiff.

49 [Endorsed:] Supreme Court U. S. 1891, October term. No. 257. The U. S. *ex rel.* Joseph E. Jones, pl'ff in error, *v.* The County Court of Macon County *et al.* Assignment of errors. Filed Oct. 5, 1891.

[Endorsed:] No. —. United States *ex rel.* Joseph E. Jones, relator, pl'ff in error, *vs.* The County Court of Macon County and the Judges Thereof, respondents, defend'ts in error. From United States circuit court, northern division, east'rn jud'c'l dist. of Mo.

Endorsed on cover: Case No. 13340. E. Missouri C. C. U. S. No. 257. The United States *ex rel.* Joseph E. Jones, plaintiff in error, *vs.* The County Court of Macon County and the Judges Thereof. Filed October 16, 1888.

FILED
MAR 29 1892
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES Ex REL. JOSEPH E. JONES,
Plaintiff in Error,

vs.

THE COUNTY COURT OF MACON COUNTY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

T. K. SKINKER,
Of Counsel.

A. R. FLEMING & CO., PRINTERS, 823 N. Third St., St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES EX REL. JOSEPH E. JONES,
Plaintiff in Error,

vs.

THE COUNTY COURT OF MACON COUNTY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT.

This is a proceeding by *mandamus* to compel the County Court of Macon County, Missouri, to levy a tax to pay a judgment for $8,974.35 obtained by relator November 25, 1884, on coupons of bonds issued by the county in aid of the Missouri and Mississippi Railroad Company.

The information and alternative writ aver that the subscription, to pay which the bonds were issued, was made on the 9th of February, 1869, and was authorized by the seventeenth section of chapter sixty-three, of the General Statutes of Missouri of 1866. They

also aver that the respondent had been requested to levy a tax to pay the judgment, but had refused so to do.

The return of the respondents admits the judgment, but denies that the bonds from which came the coupons upon which it is founded, were issued pursuant to section seventeen, chapter sixty-three, General Statutes Missouri, 1866, and avers the fact to be, that there were two subscriptions, of $175,000 each, made by the County Court of Macon County, to the capital stock of this company, one on the second day of April, 1867, the other on the second day of May, 1870; that bonds were issued in payment of each of these subscriptions; that of the coupons upon which relator's judgment was based fifteen, of the value of $70 each, were annexed to bonds issued to pay the first subscription, and one hundred and thirty-nine, of the value of $40 each, were annexed to bonds issued to pay the second; that both of these subscriptions were made and the bonds were issued without the assent of two-thirds of the qualified voters of said county, and in pursuance only of the thirteenth section of the Act "To incorporate the Missouri & Mississippi Railroad Company," approved February 20, 1865, which section reads as follows:

"It shall be lawful for the corporate authorities of any city or town, the County Court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year."

That every year since the making of these subscriptions the County Court has levied the tax of one-twentieth of one per cent. provided in this section, and that this tax has been collected for the purpose of paying these bonds. The return then advances the claim

that these bonds were issued with express reference to payment only out of the proceeds of this tax, and proceeds further to quote a provision of the present constitution of the State, adopted in 1875, whereby the tax that can be levied for county purposes is limited to fifty cents on each one hundred dollars of taxable property, and it avers that this tax has every year been levied, and that its proceeds have always been applied according to law, and that the County Court has no power to levy any other tax than these two.

To this return the relator filed a reply, in which he admits that the bonds to which were annexed the coupons on which his judgment is based, were issued to pay subscriptions to the capital stock of the Missouri and Mississippi R. R. Co., made under and in pursuance of the provisions of the charter of said company, and without the consent of the qualified voters of the county, as pleaded in the return, but insists that at the time they were issued the County Court of Macon County had a general power to levy such sums as were annually necessary to defray the expenses of the county, including judgments against it, as provided in Wagner's Statutes, section 165, page 1,193, and the claim is that respondents are bound to levy this tax for relator's benefit.

The parties filed a stipulation, setting forth that the assessed value of all the property in Macon county has, at all times, been less than six million dollars; that the tax of one-twentieth of one per cent., levied each year pursuant to the thirteenth section of the charter of the Missouri and Mississippi Co., has always been collected, and has been applied, as far as it would go, to the payment of the bonds, but that nothing has ever been paid on relator's judgment; that the proceeds of this tax are about twenty-five hundred dollars

per annum, and that there are now registered against the fund, to arise from said tax, warrants to the amount of between forty and fifty thousand dollars.

The case was tried on these pleadings and the stipulation, and the writ was denied. Relator then sued out this writ of error.

BRIEF.

1. At the dates at which relator's bonds were issued there were general statutes in force authorizing the levy of taxes to defray the expenses of the county. It is well settled that the holders of such bonds were entitled, when the tax levied under the thirteenth section of the railroad charter was exhausted, to have the remainder of their claims paid out of the proceeds of such taxes.

2. These general statutes, though now repealed so far as they provided for current county expenses, are still in force so far as concerns these bonds. Relator may invoke their benefit, and under them he is entitled to have a tax levied sufficient to pay his judgment.

ARGUMENT.

I.

1. At the dates at which relator's bonds were issued there were general statutes in force authorizing the levy of taxes to defray the expenses of the county. It is well settled that the holders of such bonds were entitled, when the tax levied under the thirteenth section of the railroad charter was exhausted, to have the remainder of their claims paid out of the proceeds of such taxes.

1. The first set of bonds were issued to pay a subscription made April 2d, 1867, the second to pay one made May 2d, 1870. The rights of the parties to the subscriptions, and consequently of the parties to the bonds, therefore attach as of these dates. It will accordingly be necessary to ascertain what the laws then were with reference to taxation for county purposes.

The General Statutes of 1866, which took effect August 1st of that year (Gen. Stat. 1866, p. 882, Sec. 2), contained the following:

"The several County Courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for State purposes: but the county tax shall in no case exceed the State tax on the same subject of taxation, more than one hundred per centum for the same time."

Gen. Stat. 1866, p. 121, Sec. 76.

This made the State tax the gauge or standard by which the maximum amount of the county tax was to be fixed. The law in reference to the State tax at that time was as follows:

The annual tax levied upon all subjects of taxation, exclusive of taxes for the Union military fund, shall be at the following rates: First, on all male persons over twenty-one

and under fifty years of age, one dollar; second, on lands and other property, real and personal, made taxable by law, forty cents on the hundred dollars of the assessed value thereof.

Gen. Stat. 1866, p. 96, Sec. 7.

Beginning with the first of August, 1866, therefore the several County Courts were authorized to levy a tax "to defray the expenses of their respective counties," not more than double the State tax; and as the State tax was forty cents, the county tax might be eighty cents on each hundred dollars of taxable property.

March 12, 1867, a change was made. Two Acts were passed, whereby that which had formerly been known as the State tax was divided into two branches, State revenue tax and State interest tax. The Acts were as follows:

The annual taxation for the years 1867 and 1868, for the purpose of revenue, shall be at the following rates: First, on all male white persons, over twenty-one and under fifty-five years of age, fifty cents; second, on all lands and other property, real and personal, made taxable by law, twenty-five cents on the one hundred dollars of the assessed value thereof.

Acts 1867, p. 157, Sec. 1.

In pursuance of the requirements of the sixth section of the ordinance of the Convention, adopted April 8, 1865, there is hereby levied, and shall be assessed and collected, for the years 1867 and 1868, a tax of four-tenths of one per cent. on the assessed value of all the real and other property subject to taxation in this State, and, when so collected, shall be paid into the State treasury, and placed to the credit ot the "State Interest Fund," to be applied to the payment of the interest on the State debt.

Acts 1867, page 168, Sec. 1.

The result of these two Acts was to make the total State tax for the time being sixty-five cents on the one hundred dollars.

Section 76, of the General Statutes, and the two Acts of March 12th, 1867, were in force on the second of April, 1867, when the first issue of bonds was made. At that time, therefore, the State tax was the gauge; the county tax might exceed it one hundred per cent., and the limit of the county tax for the time being was one dollar and thirty cents on the one hundred dollars.

January 30th, 1868, a further change was made. Section 76, of the General Statutes, was amended to read as follows:

The several County Courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law, for State purposes, except what is herein excepted by this Act; but the county tax shall, in no case, exceed the State revenue tax, on the same subjects of taxation, more than one hundred per centum for the same time.

Acts 1868, p. 142, Sec. 2.

By this Act, it is seen, the State revenue tax was adopted as the gauge instead of the State tax. The State revenue tax having been fixed by the Act of 1867, *supra*, at twenty-five cents, the county tax thus became fifty cents on the one hundred dollars.

The two Acts of 1867 were by their terms temporary only. February 16th, 1869, a permanent Act was passed fixing the State revenue and the State interest taxes. It is as follows:

There shall be annually levied, assessed and collected, on the assessed value of all the real estate and other property subject by law to taxation in this State, one-fourth of one per centum for State revenue, and one-fourth of one per centum for the payment of all State indebtedness.

Acts 1869, page 81, section 1.

The above Acts of January 30, 1868, and February 16, 1869, were in force May 2, 1870, when the second issue of bonds was made. At that time, therefore, the State revenue tax was the gauge; the county tax might exceed it one hundred per cent., and the limit of the county tax for the time being was fifty cents on the one hundred dollars.

No further change took place until 1872, when the whole revenue law was revised, and the following sections were enacted:

There shall be annually levied, assessed and collected on the assessed value of all the real estate and personal property subject by law to taxation in this State, one-fifth of one per centum for State revenue, and one-fourth of one per centum for the payment of all State indebtedness.

Acts 1872, p. 85, section 7;
Wagner's Statutes, p. 1159.

The several County Courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for State purposes, except what is herein excepted by this act; but the county tax shall in no case exceed one-half of one per cent. on all taxable property; and on all licenses made taxable by law the county tax shall not exceed the State revenue tax more than one hundred per centum for the same time—the State interest tax not to be construed to be State revenue tax.

Acts 1872, p. 116, section 166 (165);
Wagner's Statutes, p. 1193.

The latter section, it will be observed, continued the State revenue tax as the gauge of the county tax on licenses, but adopted an absolute rate as the maximum county tax on property. Under this section, the maximum rate on licenses was forty cents on the one hundred dollars, while on property it was fifty cents.

In 1887, when relator sued out his alternative writ in this case, the following Act was in force:

There shall be annually levied, assessed and collected, on the assessed value of all the real estate and personal property, subject by law to taxation in this State, one-fifth of one per centum for State revenue, and one-fifth of one per centum for the payment of all State indebtedness.

2 Rev. Stat. 1879, section 6663.

Under this section the entire State tax was two-fifths of one per cent., or forty cents on the one hundred dollars; while the State revenue tax was one-fifth of one per cent., or twenty cents on the one hundred dollars.

As shown above, the law in force when the first bonds were issued, permitted a county tax to be levied to the amount of twice the State tax; while that in force when the second issue was made, permitted a county levy to the amount of twice the State revenue tax. If it be assumed that holders of bonds of this class are entitled to the benefit of the county tax authorized to be levied when the bonds were issued, and that that tax is always to be determined by the amount of the State tax or the State revenue tax, as the case may be, when the time comes to levy it, then the relator claims that he was entitled, at the time of suing out his alternative writ, to a tax not exceeding eighty cents, so far as his judgment is founded on bonds of the first issue, and to a tax not exceeding forty cents, so far as it is founded on bonds of the second issue.

At the time of suing out the writ, relator's judgment, with interest, amounted to about ten thousand six hundred dollars. The precise value of the taxable property in the county is not stated in the record. By the stipulation, it is shown to be less than six million dollars, and it is also shown that a tax of one-twentieth of one per cent., levied on it, yields annually about twenty-five hundred dollars. Approximately, therefore, the taxable wealth of the county may be stated at

five million dollars. The official report of the State auditor for 1887 puts it at five million, two hundred and eighty-seven thousand, four hundred and eighty-two dollars. A tax of twenty cents on the one hundred dollars would yield about ten thousand six hundred dollars, the amount of relator's judgment, with interest. His prayer for a levy, sufficient to pay his judgment, is, therefore, within bounds, if he is entitled to a levy at all. We will now proceed to show that he is so entitled.

2. That the holders of bonds issued under the charter of the Missouri and Mississippi Railroad Company had a right to the proceeds of the tax levied to defray county expenses, after exhausting the special tax authorized by the thirteenth section of the charter, is well settled.

U. S. *ex rel.* Johnston vs. Clark County Court, 96 U. S. 211;

County of Macon vs. Huidekoper, 99 U. S. 592;

U. S. *ex rel.* Harshman vs. Knox County Court, 109 U. S. 229;

Ralls County Court vs. U. S., 105 U. S. 733.

In Johnston vs. Clark County Court, the bonds were issued by authority of the thirteenth section of this charter, on the first day of June, 1871. At that date the Tax Acts of January 30, 1868, and February 16, 1869, were in force, under which, as we have already shown, the authorized county tax was fifty cents on the one hundred dollars, or one-half per cent. This fact was before the court in that case, as appears on page 213, where it is said that "the statutes of the State make it the duty of the County Court to levy taxes for county uses, not exceeding the rate of five

mills, or one-half per cent." The proceeds of this tax constituted what is in that case called the general funds of the county, and out of them the relator claimed the right to have his judgment paid, and, in order to secure this end, sought to compel the County Court to issue to him a warrant drawn on the general funds. The county, on the other hand, claimed that he had no recourse, except upon the special fund created by the levy of one-twentieth of one per cent. This latter tax produced but a trifling sum each year, and that was speedily exhausted. The court, construing the charter, held that the Legislature had put no limit upon the amount of bonds to be issued; that those which had been issued were "a debt of the county as fully as is any other liability;" that the tax of one-twentieth of one per cent., authorized by the charter, was a special provision for payment of this debt, superadded to that for all debts and liabilities by the statutes above spoken of, and that when this special provision was exhausted, the bondholder had a right to fall back upon the general tax.

It has been said that the decision does not refer specifically to the fund that could be raised under the general tax law in force when the bonds were issued, but meant only such fund as might exist in the county treasury at any time and under any changed state of the law; and it has even been said that there is nothing in the opinion inconsistent with the idea that the Legislature may diminish the general tax, even to the point of extinction, without infringing any right of the bondholders. We think this is clearly an error. Much of the argument of Mr. Justice Strong is devoted to showing that it must have been the intention of the Legislature that the bonds should be salable, and that this could not be, if purchasers of the bonds were to be

limited to the one-twentieth of one per cent. tax. Hence, he argued, it must have been the intention that they should have recourse not only to this special tax, but to the general fund as well. But what additional credit would this give them, if it was in the power of the Legislature to diminish or abolish the general fund at will? This fund was raised by a tax of one-half of one per cent., a fact which appeared in the record in that case, as already stated. When Mr. Justice Strong spoke of the general fund, he undoubtedly referred to this particular tax. It is always the law in force when the contract is made, to which the creditor must look. It is this only upon which he can rely. His would be a blind faith, indeed, if he looked to something that the Legislature might do for him in the future, or might refrain from doing.

If it be said that there could never be any danger that the general fund would be abolished, because the county will always need money, and, therefore, the bondholders could always feel an assurance that there would be means to pay their demands, whatever changes might take place in the law, our answer is that if the Legislature has power to make such changes, it may put upon the general fund additional burdens which will practically absorb the whole of it, and in a variety of other ways impair or even destroy the security of bondholders. We will presently point out what has been done in that direction.

In the Clark county case the general tax had been levied, and the bondholder, expecting it to come into the treasury, sought a warrant, the means provided by Missouri laws for enabling him to appropriate so much of it as would be necessary to pay his demand. In the present case, this tax not having been levied, the relator is seeking to have it levied for his benefit. Upon

the authority of the Clark county case, and the other cases above cited, we insist that relator is clearly entitled to the relief demanded.

II.

These general statutes, though now repealed so far as they provided for current county expenses, are still in force so far as concerns these bonds. Relator may invoke their benefit, and under them he is entitled to have a tax levied sufficient to pay his judgment.

But it may be said that the foregoing Acts are no longer in force, and, therefore, the relator is entitled to no relief under them.

This claim is based on sections 7653 and 7662, Revised Statutes, 1889. These sections originated in 1879, and appeared in the revision of that year as sections 6798 and 6807.

The former section (7653) is as follows:

The following named taxes shall hereafter be assessed, levied and collected in the several counties in this State, and only in the manner and not to exceed the rates prescribed by the constitution and laws of this State, viz: The State tax and the tax necessary to pay the funded or bonded debt of the State, *the tax for current county expenditures* and for schools.

Section 7662 is as follows:

***For county purposes*, the annual tax on property, *not including taxes for the payment of valid bonded indebtedness*, or renewal bonds issued in lieu thereof, shall not, in any county in this State, exceed the rates herein specified. In counties having six million dollars or less, said rate shall not exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and less than ten million, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and not exceeding thirty million, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not**

exceed thirty-five cents on the hundred dollars valuation. The rates herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes.

The first of these sections authorizes a county tax only "for current county expenditures." No question can be made that this language excludes from the benefit of this tax everything which is not a "current county expenditure." It is equally unquestionable that relator's coupons, issued twenty-five years ago, cannot be classed as current expenditures. They are past indebtedness.

The other section is even more explicit. It declares in express terms that the county taxes, whose limits are therein fixed, shall not include "taxes for the payment of valid bonded indebtedness."

Taken together, the two sections mean that taxes for current expenses are to be limited to the rates named, and, of course, when collected, can be used to pay such expenses only. Under these sections Macon county, with her taxable wealth of less than six million dollars, can levy a county tax at the rate of fifty cents on the hundred dollars, but no part of the proceeds can be applied to the payment of relator's bonds. The difference between the new tax and the old tax may be mathematically stated thus: The old tax was to pay current expenses, plus debt. The new tax is to pay current expenses only.

The foregoing sections are undoubtedly to be taken as working a repeal of former laws, so far as they provided for current expenses.

Revised Statutes 1889, section 6606.

But do they repeal the former laws, so far as the latter afforded a provision for the the payment of past indebtedness?

We insist that they do not.

1. Because the former laws entered into the bonds and became a part of the contract between the bondholders and the county, and, as long as the bonds are unpaid, these laws cannot be repealed.

Von Hoffman vs. Quincy, 4 Wall. 535;
Wolff vs. New Orleans, 103 U. S. 358, 364;
U. S. vs. New Orleans, 98 U. S. 381, 397;
McGahey vs. Virginia, 135 U. S. 693.

At least they cannot be repealed without giving the bondholders an adequate substitute or full equivalent.

Wolff vs. New Orleans, 103 U. S. 369;
Ralls County Court vs. U. S., 105 U. S. 738;
Mobile vs. Watson, 116 U. S. 306;
McGahey vs. Virginia, 135 U. S. 693.

In most of the foregoing cases the power of taxation invoked by the bondholders was a special power, granted in the Act under which the bonds were issued, and it was held that the power could not be withdrawn. Von Hoffman vs. Quincy is of that class, and is the leading case. But the rule is not limited to such cases. In Wolff vs. New Orleans, the question was whether the city could be compelled to levy a tax to pay the principal of certain bonds. The Act under which the bonds were issued contained no provision on the subject. But the city charter, in force at the time, invested the city "with all the powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same." This court held that the power of taxation is an incident to such a corporation; that the city, therefore, had the power, when the bonds were issued under the clause quoted, to provide the means by taxation for their pay-

ment; that this power could not be withdrawn by subsequent legislative enactment, and, therefore, the relator was entitled to a *mandamus*, requiring the levy of a tax to pay his claim. This case is direct authority that the rule is the same, whether the power relied upon by the bondholder is a special power appropriated by statute to the payment of bonds alone, or whether it is a general power providing for the payment of all obligations alike—current expenses as well as back debts. The clause above quoted was the one which provided what may be called the general funds of the city of New Orleans, just as the Acts set out in the first subdivisions of this brief are the ones which, in 1867 and 1870 provided the general funds of Macon county. We submit that that case and the present are strictly analogous.

2. So far as the bondholders are concerned, the taxes authorized by the statutes of 1889 and 1879 are not a substitute for those authorized by former laws.

(1.) Because, as already shown, the bondholders are expressly excluded from any participation in their proceeds. This is decisive.

(2.) Because, by the statutes of 1889 and 1879, the rate of taxation is limited to fifty cents, and may drop to forty cents, or even thirty-five cents, as the taxable wealth of the county increases. In point of fact, since the institution of these proceedings, the assessment of Macon county has been raised to eight million dollars, and the rate to be levied, under the statute of 1889, is 40 cents. Under the Acts in force when the bonds were issued, as shown above, the rate was to be double the State tax, or double the State revenue tax, and might greatly exceed the present figures.

(3.) Because the present tax is subjected to charges to which the former was not subject. That is, out of the proceeds of the former tax nothing had to be paid for roads, bridges or the erection of poor-houses. At the time relator's bonds were issued, the law provided special taxes for these purposes. The road tax Act was as follows:

For the purpose of opening, repairing and improving roads, and in order to raise the necessary funds to pay the expenses of any or all of said opening, repairing, or improvements, the County Courts of the various counties shall levy a special tax, not exceeding four mills on the dollar of the taxable property of the county, and all property taxable by law, which shall be known as the "road tax," said levy to be made at the same time and in the same manner as the county revenue is levied; and hereafter all property, whether belonging to non-residents or others subject to pay a county tax, shall be made subject to pay a road tax; and it shall be the duty of the County Court to have all road taxes that are levied, both poll and property tax, for opening, working, and repairing public roads, placed in a separate column of the State and county tax book, and collected in like manner and with same effect as the State and county revenue are or may be by law collected.

Acts 1868, page 154, section 27.

So there was a special tax for bridges in some cases. The Act was as follows:

Whenever twelve resident tax-payers in any township or townships petition the County Court for a bridge in such township or townships, giving the name of the stream and locality of the contemplated bridge, the court shall make an estimate of the cost; and if they cannot ascertain the probable cost, they shall order the road commissioner to proceed to the place where the bridge is to be built, and make an accurate estimate of the cost of the material and building, according to any plan or plans ordered by the court, or such as, in his opinion, may be best, and without delay make report thereof; and if the citizens of the township or townships raise one-half the estimated cost, and certify the fact to the County Court, the court shall immediately make an

appropriation for the other half, and, if necessary, levy a tax on the taxable property of the county for that purpose.

General Statutes 1866, p. 298, Sec. 13.

So there was a special tax to pay for the erection of poor-houses. The two sections of the Act, material to be noted, were as follows:

SEC. 8.—Such County Court may cause to be erected, on the land so purchased or leased, a convenient poor-house, and cause other necessary labor to be done, and repairs and improvements made, and may levy upon their respective counties such sum as will be sufficient to pay the purchase money, and to defray the necessary expenses.

SEC. 12.—The sum levied upon the county, by virtue of the provisions of this chapter, shall be levied and collected in the same manner that county taxes are levied and collected; and the collector shall account for the same in the same manner, except that he shall pay over such sums as he may have collected at any time, when demanded by the treasurer of the county.

General Statutes, 1866, p. 233.

The tax to defray county expenses was thus not subject to draft for these important items, and the holder of bonds, like the relator's, had a fair show for the payment of his demands. Now all county charges have to be paid out of the proceeds of the general county tax.

Revised Statutes 1889, sections 7653, 7662;
Constitution of Missouri of 1875; 1 Revised Statutes, 1889, p. 97, Art. 10, Sec. 11;
Arnold vs. Hawkins, 95 Mo. 569.

As shown by the return in this case, the whole county tax in Macon county is needed, and is used, for the payment of these charges, to the entire exclusion of the bondholders.

It being the settled law that the Legislature cannot impair the obligation of a municipal contract by repeal-

ing a tax made for the benefit of the municipal creditor, and in force when the contract was made, it must follow that it likewise cannot make new charges upon the proceeds of such a tax, for this impairs the obligation of the contract, if not wholly, at least *pro tanta*. To the bondholders, therefore, the present county tax is not an equivalent of the old, because of these new charges.

3. For the foregoing reasons, we insist that while the act of 1889 prescribes the county tax for current expenses, the old laws are still in force for the benefit of the holders of bonds issued before the present laws were enacted. If objection be made that under this construction the Legislature has in effect subjected indebted counties to two taxes, where before there was but one, we answer that the Legislature has power to do that. The constitution of 1875 expressly reserved that power to them. It provides restrictions on the rates of taxation for county purposes, but declares that "said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness."

Art. 10, Sec. 11, *supra*.

As to such indebtedness, therefore, the Legislature is free from any restriction, and may consequently impose any tax that it may see fit. It has power to-day to enact a law authorizing a levy of fity cents (or any other sum) annually to pay these bonds. What it has done, we insist, is equivalent to this, namely: it has created a new county tax for current county expenditures, and has left the old tax for the use of the bondholders in those counties which have bondholders en-

titled to its benefit. Thus the bondholders get a tax under the old law, appropriable exclusively to their use, while the county has a tax under the new law, appropriable to current expenditures only, and not subject to the demands of the bondholders. This is a wise and beneficent result, ensuring to the bondholders a fund which will ultimately pay their claim, and to the county a fund not subject to interference from them.

4. The cases of Huidekoper vs. Macon County, 99 U. S. 592, and Macon County Court vs. Huidekoper, 134 U. S. 332, do not militate against us.

The first named case is not against us, because it did not ask for the levy of a tax under the old law, and did not decide that none could be levied under that law. Indeed, that was the only law in force when the decision was made (October term, 1878), and the chief justice expressly says that no complaint is made that that tax had not been levied.

The second named case is not against us. It only decides that a township tax is not a county tax. True, it is assumed in the opinion that the relator was entitled to share in the tax levied under the Act of 1879, as if that was a mere continuation of the old tax; but this point was not considered. It was erroneously assumed by the counsel on both sides to be so; and the court, not being familiar with Missouri statutes, simply accepted the error. In one particular, the case is an authority in our favor. The court ordered the levy of the twenty-cent tax solely on the ground that the law, at the time the bonds were issued, permitted a fifty-cent tax, and the county had levied but thirty cents. No reference was made to the constitution of 1875, or the laws of 1879. The relator admitted, by his pleading, that the thirty cents levied by the county was part of the fifty

cents, authorized at the time the bonds were issued. Consequently, when the court decided that the twenty cents should be levied, it decided that the bondholder had a right to the tax as it existed when his bonds were issued. The relator might have asked the court for the whole fifty cents. He, however, admitted away thirty cents of his claim, and obtained a special levy for the twenty cents, but this twenty cents was distinctly given, on the ground that it was authorized at the time of his contract. To this extent, the case is a direct authority in our favor.

Respectfully submitted,

T. K. SKINKER,

Of Counsel for Plaintiff in Error.

Clerk Supreme Court U. S.
FILED.
OCT 26 1891

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1891.

TERM No. 257.

THE UNITED STATES *ex rel.* JOSEPH E. JONES,

Plaintiff in Error,

vs.

THE COUNTY COURT OF MACON COUNTY

AND THE

JUDGES THEREOF,

Defendants in Error.

In error to the Circuit Court of the United States for the Northern Division of the Eastern District of Missouri.

GEORGE A. SANDERS,

For Plaintiff.

SPRINGFIELD:
H. W. ROKKER, PRINTER AND BINDER.
1891.

IN THE

Supreme Court of the United States of America,

OCTOBER TERM, A. D. 1891.

Mandamus.

THE UNITED STATES *ex rel.* JOSEPH E. JONES,

Plaintiff in Error.

vs.

THE COUNTY COURT OF MACON COUNTY AND THE JUDGES THEREOF,

Defendant in Error.

} Error to the Circuit Court Northern Division of the Eastern District of Missouri.

STATEMENT.

The respondent in this case on the 2d of April, 1869, subscribed $175,000 to the stock of the Missouri & Mississippi, Railroad Company, incorporated under Act of the Legislature of Missouri, February 20, 1865, and issued its bonds from time to time, and delivered them to the Railroad Company, as it demanded them until they amounted January 1, 1870, to $175,000, the amount of that subscription, interest at seven per cent. annually, payable at the banking house of Bartholow, Lewis & Co., St. Louis, Missouri.

On the 2d day of May, 1870, the county court of said county made another and further subscription of $175,000 to the stock of the said railroad company, and issued bonds of the county of Macon to pay for the same, bearing different rates of interest and due in twenty years from date, and payable at the Bank of Commerce in the city of New York, N. Y.

All these bonds cite on their face as authority for the subscription to the stock of the railroad company, and the issue of the bonds to pay the same by the county court, the Act of the Legislature of February 20, 1865.

On the 25th of November, 1884, the relator herein owning and holding bonds and coupons in default in the above issues, obtained a general judgment against the county of Macon, Mo., for $8,974.39. The judgment was absolute and with no conditions attached, except that $774.30 bears interest at the rate of 7 per cent. and $8,200.09, at the rate of 6 per cent. per annum, in accordance with the statute of Missouri.

This judgment was rendered in the Central Division of the Western District of Missouri, and was removed according to law, to the Northern Division of the Eastern District of the State. This is a mandamus proceeding to compel by taxation the payment of this judgment.

Judge Thayer rendered his decision May 28, 1888, in the court below, denying the peremptory writ prayed for and dismissed the proceedings at relator's cost. Transcript of record, pages 18 and 19.

From this decision relator comes to this court on the following assignments of error, to-wit:

UNITED STATES *ex rel.* JOSEPH E. JONES.

vs.

MACON COUNTY COURT AND THE JUSTICES THEREOF, STATE OF MISSOURI.

ASSIGNMENTS OF ERROR.

First—The court erred in not granting the petition of the plaintiff for an order of court for a tax levy sufficient to pay the judgment of the plaintiff in full.

Second—The court erred in holding that the one-twentieth of one per cent. rate of taxation mentioned in section 13 of the charter of the Missouri and Mississippi Railroad Company, is the limit of the taxing power of the defendant to pay the judgment of the plaintiff.

Third—The court erred in refusing to grant the relief prayed by the plaintiff, to-wit: A special tax levy sufficient to raise funds enough to pay the plaintiff's judgment in full, under any and all laws of the State of Missouri existing at the time the bonds and coupons on which the plaintiff's judgment was based, were issued.

Fourth—The court erred in not ordering a special tax levy sufficient to pay plaintiff's judgment in full, under sections 17 and 18 of the general railroad law of the State of Missouri.

Fifth—The plaintiff is in law and equity entitled to the use of all legal means and the full power of the court to aid him to collect his judgment irrespective of any rates of tax-

ation recited in the bonds upon which the judgment is based, and the court erred in refusing to order the tax levy prayed for in the petition.

Sixth—The court erred in refusing to grant the relief prayed for in plaintiff's petition and in giving judgment against the plaintiff for costs.

Seventh—The court errer in refusing to order the tax levy prayed for by the plaintiff sufficient to pay his judgment, and in giving judgment for the defendants for costs.

Eighth—That the said judgment of the court below is contrary to the law in the case.

Ninth—That the said judgment of the court below is contrary to the law and the evidence in the case.

GEORGE A. SANDERS,
For Plaintiff.

Copies of a bond and of sections of the statute and constitution relied upon, and of section 13 of the act of Feb. 20, 1865, will be found in the appendix to this brief.

We deem it not improper to call the attention of the court to the fact that rules adopted by the court, and promulgated May 11, 1891, have no particular application to this case, as the application for a writ of error was filed June 18, 1888, and the citation issued Sept. 11, 1888.

APPENDIX.

[COPY OF A BOND.]

No. 12. Macon County Railroad Bond. $1,000.
County of Macon (Vignette) State of Missouri.
Ten years.

Know all men by these presents, That the county of Macon, State of Missouri, acknowledges itself indebted to the Missouri and Mississippi Railroad Company (organized by an act of the General Assembly of the State of Missouri) or bearer, the sum of one thousand dollars, which sum the said county promises to pay banking house of Bartholow, Lewis & Co., in the city of St. Louis, Mo., on the first day of February, 1879, with interest at seven per cent. per annum, which interest shall be paid annually on presentation of the coupons thereto annexed, at the banking house of Bartholow, Lewis & Co., in the city of St. Louis, Mo.

This bond being issued under and pursuant to the orders of the county court of Macon county, for subscription to the stock of the Missouri & Mississippi Railroad Co., authorized by an act of the General Assembly of the State of Missouri, entitled "An act to incoporate the Missouri & Mississippi Railroad Company," approved February 20, 1865.

In testimony whereof, the said county of Macon, has executed this bond, by the presiding justice of the county court of Macon county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereto, attesting the same, and affixing the seal of said county.

This done at the city of Macon, county and State aforesaid, this first day of February, 1869.

Registered in bond book, page 112.

JOHN FARRAR, *Clerk*.
J. R. ALDERMAN,
Presiding Justice of the County Court of Macon County.

[SEAL.]

Endorsed as follows:

Macon County Railroad Bond No. .....$1,000. County subscription to the Missouri & Mississippi Railroad Company, due February 1, 1879.

The 13th section of the act of February 29th, 1865, is as lollows:

"Sec. 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

Laws of Missouri, 1865, p. 88.

The general railroad law provides as follows:

"Sec. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the State: *Provided*, that two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription."

Section 18, among other things, provides: "And in order to raise money to pay the installments which may be called from time to time by the board of directors of said railroad, it shall be the duty of the county court, * * * making such subscription, to issue their bonds, to levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers, and other business men may have invested in business in the county * * * to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription. * * ."

General Statutes of Missouri, 1865, page 338.

POINTS AND AUTHORITIES.

1. The relator's judgment is for a fixed definite sum of $8,974.39, dated Nov. 25, 1884. $774.30 bears interest at 7 per cent. and $8,200.09 at 6 per cent. It has no limitation expressed therein, and the respondent must pay it in full, as any other corporate debt, by taxtion, as it has no other means of raising money.

Dillon Mun. Corp., Secs. 686, 419 and citations.
Von Hoffman v. *City of Quincy*, 4 Wall. 535.
United States v. *County of Clark*, 96 U. S. 211.
United States v. *New Orleans*, 98 U. S. 881.
The Commonwealth v. *Commissioners of Allegheny Co.* 37 Pa. and page 277.
Lowell v. *Boston*, 111 Mass., 460.
Hasbrouck v. *Milwaukee*, 25, Wis. 122.
Parsons v. *City of Charleston*, Hughes 282.
Ralls County v. *U. S.* 105, U. S. 735.
City of Galena v. *Amy*, 5 Wall. 705.
Butz v. *City of Muscatine*, 8 Wall. 575.
Transcript of Record pp. 18 and 7.

2. The 1-20 of 1 per cent. mentioned in section 13th of this act of incorporation of the railroad company, subscription of respondent to whose stock bonds and cupons that entered into relator's judgment were issued to pay, was placed there to aid in the sale of the bonds, and was in no wise intended as a limitation to the taxing power of the respondent. This must be so as it could in no possible

event pay but a small fraction of the debt contracted if honestly levied and collected, and paid.

United States v. *County of Clark*, 96, U. S. 211.
Parsons v. *City of Charleston*, Hughes 282.
Lowell v. *Boston*, 111, Mass. 460.
Commonwealth v. *Commissioners of Allegheny Co.*, 37 Pa.. page 277.
Supervisors v. *U. S.*, 4 Wall. 435.
Mayor v. *Lord*, 9 Wall. 409.

3. This honorable court has held that any surplus funds or balance remaining above necessary current expenses of the county, respondent should apply to the payment of judgments against the county obtained on bonds and coupons issued at the same time, and for the same purpose, and under the same laws and conditions as these that entered into relator's judgment. And in this decision has thus held that this 1-20 of 1 per cent., mentioned in Section 13, of the Act of Incorporation of the Railroad Company, was no limitation of the taxing power of the respondent.

United States v. *County of Clark*, 96, U. S. 211.
United States ex rel. Hill v. *Scotland Co.*, 32, Fed. Rept. 714.

4. If the relator has legal right to any part of any surplus funds raised by taxation, above current necessary expenses of the county, then he has a legal right to payment in full and is not limited to the 1-20 of 1 per cent. mentioned in Section 13 of the incorporating act, and has lawful right by mandamus to collect an additional tax, or a

special tax, or a sufficient tax on all the respondents' taxable property, under existing laws at the time his bonds were issued, to pay relator's judgment in full.

Any partial payment is not a legal satisfaction of a judgment. And any payment beyond the 1-20 of 1 per cent. renders that rate void as a limiting statute. The power to tax is co-extensive with the power to create the debt.

U. S. v. *New Orleans*, 98 U. S. 381–398 and citations.

Lowell v. *Boston*, 111 Mass. 460.

Parsons v. *City of Charleston*, Hughes 282.

Ralls Co. v. *U. S.*, 105 U. S. 735.

Hasbrouck v. *Milwaukee*, 25 Wis. 122.

Commonwealth v. *Commissioners of Allegheny Co.*, 37 Pa.

Wolf v. *New Orleans*, 103 U. S. 358–360.

5. The 1–20 of 1 per cent. referred to in section 13, of the incorporating act, of Feb. 20th, 1865, claimed by the respondents as the limitation of the taxing power of the county for paying relator's judgment, appears only in this legislative act, and is nullified and overcome by the terms of the State constitution of Missouri in force now and when the bonds and coupons were issued which enter into relator's judgment, and which then and now allows the levy of necessary and sufficient taxes on the assessed property of

the county for the payment of valid indebtedness then existing of the county of which relator's judgment was made.

Constitution of Nov. 30, 1875, Article 10, Section 11 (latter part of Section), p. 81, Revised Statutes Mo., Vol. 1, 1879.

East St. Louis v. *Amy*, 120 U. S. 600.

Neal v. *Delaware*, 103 U. S. 370.

6. The recitals on the bonds make no reference whatever to any rate of taxation for payment. They simply state, "This bond being issued under and pursuant to the orders of the county court of Macon county, for subscription to the stock of the Missouri and Mississippi Railroad Company, authorized by an act of the General Assembly of the State of Missouri, entitled an act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865. The recitals on the bonds are no more in law a part of the contract expressed therein than the existing provisions and terms of the constitution and laws of the State in which the corporation exists that issues the bonds and coupons in controversy. Recitals as to *matters of fact* ONLY and *not as to questions of law*, estop the municipality from denying them when made by officials appointed for that purpose, or by their official position know the facts to exist.

Crow v. *Oxford*, 119 U. S. 215, 226.

Hays v. *Holly Springs*, U. S. 120.

Dixon County v. *Field*, 111 U. S. 92.

7. When public corporations issue negotiable securities, all then existing laws, judicial decisions, and the State Constitution of the State in which they exist, are as much a

part of the contract as the recitals in the bonds. All the purchaser is bound to know, is that there was authority of law for the issue of the bonds he purchased, and it matters not whether the constitution or laws under which the bonds were issued are recited in the bonds or not.

Dillon Mun. Corp., Vol. 1, 541.

Ackley School Dist. v. *Hall*, 113 U. S. 139.

Mercer Co. v. *Hacket*, 1 Wall. 83.

White v. *Railroad*, 21 How. 576.

Thompson v. *Lee Co.*, 3 Wall. 331.

Com'rs of Marion Co. v. *Clark*, 94 U. S. 278.

Cromwell v. *Co. of Sac*, 96 U. S. 51.

Wolf v. *New Orleans*, 103 U. S. 358.

8. It is a question of construction, and the Act must be considered as a whole.

Bedell v. *Janny*, 4 Gill. (Ill) 193.

Elder v. *Bradley*, 2 Sneed (Tenn.) 247.

9. *The intention of the legislature must control in construing the Act of Feb. 20, 1865, and where there is a grant of power everything essential to the exercise of the power not especially mentioned will be deemed passed by implication.*

As to intention.

Duncan v. *Charles*, 5 Ill. (4 Scam.) 561.

Wilcox et al. v. *People*, 90 Ill. 186.

Douthett v. *Kettle*, 104 Ill. 356.

Van Hostrop v. *Madison City*, 1 Wall. 291.

Gelpecke v. *Dubuque*, id. 176.

Meyer v. *City of Muscatine*, id. 386.

Mitchell v. *Burlington*, 4 Wall. 271.
Maryland v. *R. R. Co.*, 22 Wall. 113.
Kirkbride v. *Lafayette Co.*, Fed. Rept., May, 1883, 501.

As to implied of powers.

Dillon Mun. Corp., Vol. 1, Sec. 58.
Abbott's Dig. Laws Corp's, 569.
Knickerbocker v. *People*, 102 Ill. 218.
People ex rel. v. *G., C. & S. R. R. Co.*, 67 Ill. 65.
U. S. v. *County of Clark*, 96 U. S. 211.

BRIEF AND ARGUMENT.

There have been a number of cases presented to this honorable court in reference to the issue of bonds and coupons that entered into relator's judgment, and also as to the taxing power of the respondent to pay similar judgments. Our excuse for presenting this, if one is needed, is that we think *we present a new question and one fully authorized* by the decision of this court in *U. S.* v. *County of Clark*, 96 U. S. 211.

MANDAMUS THE PROPER REMEDY.

Dillon in Mun. Corp., sec. 686, says: "When judgment is obtained, and there is no property subject to execution out of which it can be made, mandamus will lie, and is the proper remedy to compel the levy and collection of the necessary taxes to pay the judgment. When the claim is reduced to judgment, the duty to provide for its payment becomes perfect; and if it can be paid in no other way, it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by mandamus."

It is a continuous obligation of the corporation and is not subject to statutory limitations of the lien of such judgments.

Amy v. *City of Galena*, Fed. Rept., Vol. 7, p. 163 and citations.

The judgment in the case at bar was absolute and unconditional in favor of the relator. The respondent is concluded by the judgment and cannot inquire into conditions recited in bonds that enter into relator's judgment.

Supervisors v. *United States*, 4 Wallace, 444.
The Mayor v. *Lord*, 9 id. 409.
Riggs v. *Johnson*, 6 id. 166.
Bank of Wooster v. *Stevens*, 1 Ohio State, 233.
Wolf v. *New Orleans*, 103 U. S., 360.

The contention on the part of the respondent is that the relator is limited to a special tax of 1-20 of 1 per cent. from which his judgment must be paid, because that amount was named in the act of incorporation of the railroad company to pay for whose stock subscribed by this county, the bonds and coupons that entered into the judgment in this case were issued, and that there was no other power under which these bonds could have been issued. This proposition the relator denies and claims that his judgment stands upon the same basis as any general judgment, or liquidated liability of the respondent and must be paid by taxation. And as the amount is large, and does not belong to that class of municipal indebtedness called current expenses, or ordinary debts, but to exceptional

expenses, or extraordinary debts, it can only be paid by special or additional taxation.

Dillon Mun. Corp., Secs. 686 and 419, and citations.
Von Hoffman v. *City of Quincy*, 4 Wall., 535.
United States v. *County of Clark*, 96 U. S. 211.
Transcript of Record, pp. 7 and 18.
Parsons v. *City of Charleston*, Hughes 282.

In *U. S.* v. *County of Clark*, 96 U. S. 211, this court "held that the bonds are debts of the county as fully as any other of its liabilities, and that for any balance remaining due on account of the principal or interest after the application thereto of the proceeds of such tax, the holders of them are entitled to payment out of the general funds of the county." The bonds in the above case were issued (as it is claimed by the respondent) under the same act of incorporation and to the same railroad company, and under the same recitals of power, as were the bonds in the judgment of the relator. In the above case the court, it seems to us, granted, in substance, all that is needed except to compel the respondent by mandamus to levy a special tax, or an additional tax, or a sufficient tax to increase the general fund of the respondent county sufficient to pay off relator's judgment. Any other view of the case is but a quibble of words and terms. The tax asked for in the mandamus of the relator is one sufficient to raise funds to pay his judgment. Such a tax, by whatever name called would increase the general amount to be raised, above the current expenses of the respondent and that increase or surplus this court in the case *supra*, held

can be applied to the payment of relator's judgment herein. Again in that decision this court, and rightly we think, places these bonds and coupons on the same legal basis as "any other of its liabilities." The relator loses none of his legal rights by putting his bonds and coupons into judgment. This judgment is in the usual form and has no limitations whatever, in reference to methods of payment, or any statement as to what entered into its sum total.

Wolf v. *New Orleans*, 103 U. S. 358.

It is for $8,974.39, a part of which, $8,200.09, draws 6 per cent. interest, and a part, $774.30, 7 per cent. This is all admitted in the return No. 2,038 (transcript of record, pages 7 and 18). It therefore becomes a general liability or obligation which the county respondent is bound to pay in full the same as any other debt, and with no conditions or limitations that other general judgments are not subjected to.

The Commonwealth v. *Commissioners of Allegheny Co.*, 37 Pa. and p. 277.
Lowell v. *Boston*, 111 Mass. 460.
Ralls Co. v. *U. S.*, 105 U. S. 735.
City of Galena v. *Amy*, 5 Wall. 705.
Butz v. *Muscatine*, 8 Wall. 575.

As we understand the court in the Clark County case *supra*, the 1-20 of 1 per cent. tax allowed in the incorporating act, section 13 *is there held to be not a limitation to the taxing power of respondent* for the payment of these bonds and coupons and the judgment they made for the relator, for the reason that it allows the respondent *to pay*

surplus funds above necessary ordinary county expenses, out of another fund, the general county fund, in addition to the amount of the 1-20 of 1 per cent. which respondent claims is the limit of its power to tax to pay relator's judgment.

If this 1-20 of 1 per cent. limits the respondent's power of taxation to pay relator's judgment, then why does this court allow tax to be levied, collected and *paid out of another fund, the general county fund.* This 1-20 of 1 per cent. tax is one thing, or the other. If it is an absolute limitation of the taxing power of the respondent for paying this judgment, and in which case the respondent has no legal right to tax the people and put the amount collected, be it great or small, *into some other fund* for payment to relator in full, or in part, of his judgment. Or is it to be construed simply *as a special or additional tax, above all other special or ordinary taxes levied and collected for other county debts,* and placed there as an extra inducement to sell the bonds for the highest possible figure.

U. S. v. *County of Clark, supra,* page 216.
Parsons v. *City of Charleston,* Hughes, 232.
Lowell v. *Boston,* 111 Mass. 460.
Mayor v. *Lord,* 9 Wall. 409.
United States v. *County of Clark,* 96 U. S. 211.
United States ex rel, Hill v. *Scotland Co.,* 32 Fed. Rept. 714.

It is purely a question of construction, and to determine its force in law, the intent of the legislators must be sought after, and that intent is clear beyond a doubt. The people

were anxious for railroads, and were ready to offer inducements by way of special taxation, to purchasers of their bonds that would produce the greatest amount of ready money to build and equip their railroads, and such conditions of the taxing power were frequently put into the enabling acts of the legislature during the debt contracting period,—always for the purpose of selling the bonds for the best prices, and seldom, if ever, with reference to limiting the taxing power of the municipality issuing them to *such conditions of taxation only as were specified therein.*

Duncan v. *Charles*, 5 Ill. (4 Scam.) 561.
Wilcox ex rel. v. *People*, 80 Ill. 186.
Douthett v. *Kettle*, 104 Ill. 356.
Van Hostrop v. *Madison City*, 1 Wall. 291.
Meyer v. *City of Muscatine*, 1 id. 386.
Mitchell v. *Burlington*, 4 id. 271.

This court seems to have so considered this 1-20 of 1 per cent. condition of payment, in the *Clark County Case*, *supra*, page 216, where the court says, "it is incredible that the legislature intended to deny to the purchaser of the bonds any right to look for payment beyond such a meager provision; or, if it were so intended, that the intention would not have been so expressed in precise terms. In the absence of any express declaration that the creditor's right to claim payment shall reach beyond the fund from the small special tax, we cannot think the legislature proposed rendering the bonds unsaleable and almost worthless in the hands of those who might be so unfortunate as to hold them. Such an intention would have defeated the end sought to be secured by giving authority for their issue.

Nor can we think that the legislature intended to set a a trap for purchasers and lead them to suppose they were obtaining valuable securities, when in fact, they would obtain what was worth next to nothing. The statute justifies no implication of any such legislative intention. If it be said that the legislature, in limiting the special tax allowed, contemplated no issue of bonds beyond what one twentieth of one per cent. would pay, and did not anticipate the improvidence of purchasers who might buy bonds issued in excess of that sum, it may be answered, that still a larger issue was in fact authorized. Such an issue must therefore have been considered as possible. And it would be absurd to hold that the legislative intent was to allow the issue and sale of county bonds for a sum more than one hundred times larger than the debt acknowledged by them to be due, and more than one hundred times larger than the purchasers would be entitled to recover." The above somewhat lengthy citation undoubtedly expresses the intention of the legislature in the passage of this act of February 20, 1865, and it can be *legally construed only in the light of the intention of the legislators.* Any other construction given it renders the acts of *the legislators in passing it, and the purchasers of the bonds issued under it, as foolish and extremely absurd.*

Dillon Mun. Corp. Vol. 1, Sec. 58.
Abbott's Dig. Laws Corp's., 569.
Knickerbocker v. *People*, 102 Ills. 218.
People ex rel. v. *G. C. & S. Ry. Co.*, 67 Ills. 65.
U. S. v. *County of Clark*, 96 U. S. 211.

Statutes must be liberally construed and favorable to the party whose rights and remedies are to be forfeited by them.

Redell v. *Janny et al.*, 4 Gil. (Ill.) 193.

Elder v. *Bradley*, 2 Sneed. (Tenn.) 247.

Again to construe this 1-20 of 1 per cent. tax as an absolute limitation to the taxing power of the respondent to pay relator's judgment is to destroy almost entirely his remedy for collecting his judgment. All constructions of such enabling statutes up to the time of the issuing of these bonds had been that they were enacted to enhance the value of bonds issued under them and in no sense to limit the taxing power to pay such bonds and judgments resulting therefrom in such a manner as to render them worthless. All parties, the legislators, the railroad officials and the purchasers undoubtedly so understood this act as an inducement to sell the bonds and not as a limitation of the taxing power to pay them, and no one but an ignoramus in financial affairs, and a knave in legislation, would have invested a dollar in such bonds, and aided in passing such a law, as could be construed as an absolute limitation of the taxing power to pay bonds issued under it. If it has any limiting power it is absolute, as to the legal questions of power to tax to pay the bonds. That it is not an absolute limiting power, this court has already decided.

U. S. v. *County of Clark*, 96 U. S. 211.

This section 13 of the act of Feb. 20, 1865, grants, it is claimed by respondent, the legislative authority to issue the bonds that entered into relator's judgment. Giving the authority to contract the debt and

issue the bonds, but limiting the payment of the bonds or debt to certain conditions of taxation. It would be a most unfair, illegal and inequitable construction of an act of the legislature to allow it to grant ample power for the issuing of the debt, and specified conditions in the act as to payment of the debt that would absolutely prohibit the possible payment of most of it. In such statutes the power to tax to pay a municipal debt is always coextensive with that which creates it.

Wolf v. *New Orleans*, 103 U. S. 367.

In *Butz* v. *City of Muscatine*, 8 Wallace, 583, this court say: "The act of 1852, and the provisions of the code were in force at that time, and entered into and formed a part of the contract of the parties. They prescribed one of the remedies to which the bondholders were entitled in the event of default by the city. It has been uniformly held by this court that such remedies are within the protection of the constitution of the United States, and that any State law which substantially impairs them is as much prohibited by that instrument as legislation which impairs otherwise the obligation of the contract."

Wolf v. *New Orleans*, 103 U. S. 366-369.
Brown v. *Kinzie*, 1 Howard, 297.
McCracken v. *Haywood*, 2 id. 608.
Von Hoffman v. *City of Quincy*, 4 Wall. 535.

If these bonds issued by respondent were a contract, and they have always been so held, then this contract obligation has been impaired and practically destroyed by the

courts refusing sufficient taxing power, in existence when they were issued to pay them in full.

Wolf v. *New Orleans*, 103 U. S. 366.

If the remedy be taken away the contract is in effect annulled. Nothing is left of it, of any value to the party whose rights are thus invaded.

Von Hoffman v. *City of Quincy*, 4 Wallace, 535.

"The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution."

Wolf v. *New Orleans*, 103, U. S. 368.

The above doctrine is as applicable to the decisions and judgments of courts as to the acts of the legislature.

Butz v. *City of Muscatine*, 8 Wall. 583.

In the case of *Butz* v. *City of Muscatine*, supra, page 584, the court says: "It was there held that the laws for the collection of the requisite taxes, existing when the bonds were issued, subsequently repealed, still subsisted for the purpose of the contract, and that a writ of mandamus might issue from the circuit court to enforce them. Here the remedy is taken away; not by subsequent repeal, but by subsequent judicial decisions. The effect upon the contract is the same as if the provisions of the code had been repealed." "We are of the opinion that under the statutes, in force when the contract was made the relator is entitled to the remedy he asks, and that his right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of our

power and duties to protect the contract from the former as from the latter, and we are no more concluded by one than by the other."

"In thus limiting the power without providing other adequate means of payment of the bonds, the legislature has impaired the obligations of the contract between her and the city."

Wolf v. *New Orleans*, 103 U. S. 369.
Von Hoffman v. *Quincy*, 4 Wall. 535.

In *Von Hoffman* v. *City of Quincy*, 4 Wallace 550, this court says: "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

The question now in the case at the bar is as to the enforcement of relator's general judgment, which has been rendered by a court of competent jurisdiction. All questions as to the validity and construction of the contract in the bonds have been legally merged into an unconditional judgment, and can it be possible that any court will now hold that a mere reference to a legislative act incorporating a railroad company, which had in the act (but not recited in the bonds) a clause allowing 1-20 of 1 per cent. special tax to pay interest and principal an absolute limitation to the taxing power of the respondent to pay a judgment obtained on said bonds, when other laws in

existence at that time, gave ample power to such municipalities to issue such bonds, and the conditions and laws gave such municipalities ample taxing powers to pay all their debts or outstanding liabilities?

In *Von Hoffman* v. *Quincy*, *supra*, page 552, this court says: "Nothing can be more material to the obligation of the contract than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those social and moral duties which depend upon their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseperable, and both are parts of the obligation, which is guaranteed by the constitution against invasion."

Again: "One of the tests that a contract has been impaired is that its value has, by legislation (or subsequent judicial decisions) been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligations, dispensing with any part of its force." Page 553.

Again, pages 554 and 555: "When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time upon the whole debt. But (for the claimed limitation in Act of Feb. 20, 1865,) there would be no difficulty in enforcing them. The amount permitted to be collected by that Act (under

the claimed limitation) will be insufficient, and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose, it may be said not to exist. It is equally clear that where a state authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute."

People v. *Bell*, 10 Cal. 570.

Dominic v. *Sayre*, 3 Sanford, 555.

Wolf v. *New Orleans*, 103 U. S. 368.

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all purposes in this case. A different result would leave nothing of the contract, or judgment of the relator; but an abstract right of no practical value and with no power to enforce it, and renders the protection of the constitution a shadow and a delusion.

Von Hoffman v. *City of Quincy*, 4 Wallace, 555.

Wolf v. *New Orleans*, 103 U. S. 358.

THE DOCTRINE OF "EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS."

But we are met constantly by the respondent, that the contract in the bonds contained a limiting clause to the respondent's taxing power to 1-20 of 1 per cent., and are

referred to an ancient maxim, "Expressio Unius Est Exclusio Alterius," which to us seems of very little weight in a case like this. We are well aware of the principle and of its proper application. We believe that our argument is to the point and citations applicable, because the whole controversy hangs and turns upon the construction this court is to give the act of February 20, 1865, and whether mere reference, by way of recital, in the bonds to an act of the Legislature which effectually destroys the contract in the bonds if respondent's position is tenable, overrules the constitution and all other laws of the State as to the power of taxation to pay a general judgment in existence when the bonds were issued.

We reply to this first: That under the above citations the recitals in the bonds contained only a part, if any, of the contract; that the constitution of the State of Missouri and all laws in reference to the powers of public municipalities to levy taxes and pay their judgments and liabilities (and they were most ample) all judicial decisions up to the date of the issue of the bonds, entered into and formed a part of relator's contract as much as if recited in the bonds themselves.

And second: Because this court has held that this 1-20 of 1 per cent. recital in the act referred to in the bonds, (not recited in the bonds themselves where purchasers could see it,) *is not an absolute limitation of the taxing power* of the respondent to pay relator's judgment, this court holding that surplus funds raised by general taxation

above necessary ordinary county expenses must be applied to payment of such judgments as relator's.

United States v. *Clark County*, 96 U. S. 211.

And third: This court has held that relator's judgment was a debt of the respondent the same as any other liability, a general judgment, and if so it must be paid by additional taxes, special taxes, or a sufficient tax, as it does not belong to ordinary current expenses, and is limited only by the power of respondent under all laws of the State and constitution of Missouri then in existence to tax for payment of a judgment.

United States v. *Clark County*, 96 U. S. 211.
Amy v. *City of Galena*, Vol. 7 Fed. Rept., 163.
Wolf v. *New Orleans*. 103, U. S. 360-368.

And fourth: Under the above citations the constitution of the State and the United States are a part of the contract and protect relator from the impairment of his contract, which is rendered practically worthless by the decisions of the courts, since wrongfully rendered, holding a mere reference to a legislative act, as a limitation to the taxing power guaranteed by the constitution and other laws of the State, which were all a part of his contract, and were ample and sufficient for taxation by respondent to pay in full relator's judgment.

Wolf v. *New Orleans*, 103 U. S. 368.
Butz v. *Muscatine*, 8 Wall. 583.
Wag. Sp. Sec. 9, p. 441, and Sec. 165, p. 1193.
Rev. Stat. 1879, Vol. 1, Art. 10, Sec. 11, (latter part) p. 81.

And fifth: The constitution of the State is the fundamental law and superior to, and overrules all legislative acts, not in harmony with its terms. So far as the 1-20 of 1 per cent. in the legislative act of February 20, 1865, is a limitation of the taxing powers allowed public municipalities to pay judgments against them by the constitution of Missouri, it is overruled and is unconstitutional.

East St. Louis v. *Amy*, 120 U. S. 600.

Wolf v. *New Orleans*, 103 U. S., 358.

And sixth: Because at the time these bonds were issued, by order of the county board, as recited in the bonds, county courts had a general power "to audit and settle all demands against the county, and to levy such sums as were annually necessary to defray the expenses of the county," (surely judgments are demands against the county) which the county court is authorized to audit and settle, and are a part of the expenses of the county which that court is authorized annually to levy a tax necessary to pay.

Wag. St. Sec. 9, page 441, and Sec. 165, page 1193.

And seventh: The court below entirely ignores the point that the constitution of the State of Nov. 30th, 1875, *which controls present methods of taxation*, after its adoption, grants simple power to levy a special tax, or sufficient tax to pay relator's judgment. In the *latter part of section 11, article 10, on revenue and taxation, (P. 81, Vol. 1, Revised Statutes of Mo., 1879.)* where, referring to rates and limitations of taxing powers of counties, cities and towns, it

says: "*Said restrictions as to rates, shall apply to taxes of every kind and description, whether general or special,* EXCEPT TAXES TO PAY VALID INDEBTEDNESS, NOW EXISTING, OR BONDS WHICH MAY BE ISSUED IN RENEWAL OF SUCH INDEBTEDNESS." This State constitution *expressly* EXEMPTS ALL VALID INDEBTEDNESS, AND RENEWAL BONDS, FROM ALL LIMITATIONS OF TAXATION. Relator's bonds that went into his judgment were certainly a valid indebtedness, existing before the constitution went into effect, as the bonds were dated Feb. 9, 1869, and May 2, 1870, and this constitution went into effect Nov. 30, 1875. They and the judgment of relator made by them are exempt from all limiting rates of taxation for counties named in the first part of section 11, article 10 of the constitution of 1875, now and in this respect in force when the bonds were issued.

The old constitution on this point was readopted in that of November 30, 1875. The law prior to November 30, 1875, authorized counties to levy a special tax to pay the interest on such bonds, and provided a sinking fund to pay the principal.

Wag. St. Edition, 1872, page 306, sec. 21.

In addition to this, the county courts then had general power "to audit and settle all demands against the county," and to levy such sums as were annually necessary to defray the expenses of the county.

Wag. St. 411, sec. 9, page 1193, sec. 165.

Auditing and settling a demand means an accounting and payment of the same, and whatever the courts of Missouri

may decide, we think this court will hold that this constitution, which is the highest authority in the State, provides the means of payment of this judgment. That is, where there are no funds, by taxation, and it matters not whether it be called general fund, special tax or fund, or a sufficient tax or fund to pay relator's judgment. It is *the thing, the money, he desires*, and he is not particular under which name or term the courts authorize it, and the county raises and pays it. Moreover, on the question of present power to tax by special or sufficient rate to pay relator's judgment, it may be said, in addition, that the Legislature of Missouri passed an act for compromising and funding county and township bonds, (*see laws 1879, page 51, Sec. 4,*) which provides that any county, or municipal authorities of any incorporated city or town, having compromised their indebtedness, and issued bonds therefor, or HAVING OTHER BONDS OUTSTANDING, *may, at their discretion, at the time of making the annual levy of taxes for county*, town or city purposes, *also levy in the express manner now provided by law a special tax not exceeding five mills on the dollar in any one year, which shall be extended and collected as other county* city or town taxes *are required to be extended and collected.*

This settles the question of power to make a special tax levy, for payment of their outstanding bonds, as it is left with the discretion of the county court as to the levy of this five mills special tax on outstanding bonds.

Referring again to the case of *Amy* v. *East St. Louis*, 120, U. S. 600, decided March 14, 1887, the city defendant sought to evade the payment of a judgment on bonds and

coupons, by reason of the limitation of a taxing power in its charter, a legislative act. But this court held that the limitation on the taxing power in the city charter was repugnant to the demands or terms of the State constitution on that subject, and that it was abrogated to that extent, and ordered on a mandamus a special tax levy to pay the whole amount of the judgment. *That case and the case at bar are almost exactly alike in all their leading principles, and we especially refer the court to it with confidence.*

It is from this aspect of the case simply a question whether a constitutional provision is superior to a legislative act, and of this there can be no possible doubt, from United States decisions above cited.

Wolf v. *New Orleans*, 103, U. S. 368.

This (*Amy* v. *East St. Louis*) case cited above completely refutes the doctrine laid down in *U. S.* v. *Macon Co.*, 99, U. S. 532, and *East St. Louis* v. *Zebley*, 110, U. S. 321. The doctrine in the *East St. Louis* v. *Zebley case* has been overruled by the *Amy* v. *East St. Louis case*, supra, and in that of *U. S.* v. *Macon Co.*, 99, U. S. 590. The court, as we have shown above, is mistaken, we think, when it says: "This limit has never since been increased, and the constitution of 1875, which is now in force, provided that this tax shall never exceed that rate in counties of the class of Macon. (Art. 10, Sec. 11.) The decision of the court seems largely to rest upon the above statement quoted, and yet, as shown, supra, *the latter part of the same Art. 10, Sec. 11*, is as follows: "*Said restrictions, as to rates, shall apply to taxes of every kind*

and description, whether general or special, except taxes to pay valid indebtedness now existing on bonds, or which may be issued in renewal of such indebtedness."

The court gravely says, *supra*, page 59: "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers." This relator asks only for such a levy as the constitution and laws grant him, and only the exercise of powers existing when his contract was made. The doctrine and force of the County of Macon case *supra*, is greatly modified, if not rendered of no effect, by the *Ralls Co.* v. *U. S.*, 105 U. S. 738.

THE VALUE OF RECITALS.

And ninth: Because the reference to the Act of Feb. 20, 1865, in the bonds, containing the claimed limitation of the taxing power of the respondent to 1-20 of 1 per cent. *is not in law a binding recital on either party to the contract.* The contract would be perfect and just as binding without it as with it.

Recitals in negotiable municipal bonds are binding *as to questions of fact stated, and when made in the bonds by parties legally authorized to make them, are binding and estop the municipalities so making them,* from disproving the facts so recited in a contest to recover on bonds so issued in the hands of a *bona fide* holder. But *they are never binding where the recital is as to a question of law.* This reference to an act of the legislature which has within it the claimed absolute limitation of the taxing power of the

respondent to pay relator's judgment, is only a reference to the act which gave the county court the power to subscribe to the stock of the Railroad Company.

Crow v. *Oxford*, 119 U. S. 215.
Katzenberger v. *Aberdeen*, 121 U. S. 172.
Dixon v. *Field*, 111 U. S. 83.
Hays v. *Holly Springs*, 114 U. S. 120.

This court has often held that no officers of a public corporation can bind the corporation by *recitals as to questions of law, only as to questions of fact, which the officials are authorized by a vote of the people, or ordinance of the court or council, or by virtue of their legal position to make.*

Oregon v. *Jennings*, 119 U. S. 74.
Grand Chute v. *Winegor*, 15 Wall. 371.
Mercer County v. *Hackett*, 1 Wall. 83.

We confidently submit to the court that the reference to the act of Feb. 20, 1865, in the bonds was no binding recital for either party to the contract, for the reason that the contract would have been equally binding and perfect without it, as then the relator would have, as now, to rely upon all laws then in existence to enforce the payment of the bonds. It is sufficient if the power to issue the bonds existed whether recited or not.

Commissioners v. *January*, 94 U. S. 204.
Anderson v. *Beal*, 113 U. S. 227.
Town of Keithsburg v. *Frick*, 34 Ill., 405.

And because the question of rate and methods of taxation and payment are entirely questions of law, not of fact,

and any statements in reference to them in the bonds, or in the acts of the legislature referring to them, are not binding recitals, and the statement by the respondent in each bond that "it was indebted to the bearer in the sum of $1,000, which sum the said county promises to pay, etc." is sufficient. But even this, the most important statement or recital in the bonds, has proven to be a serious question in law. . And the courts have, after a great amount of litigation in all courts, held that the respondent actually owes the bearer $1,000, and interest, specified on each one of its bonds to the M. & M. R. R. Co., but that it is by law obliged to pay only 1-20 of this sum, and that there is no law for collecting the other 19-20 of this debt. What greater judicial farce could there be than here exists. It is the boast of the respondent that it owes but 1-20 of the amount of judgments against it, and this boast is true if there be no way to collect the other 19-20 of the judgments against it.

The recital of the granting power is not a necessity on a municipal bond. It is valid under the law merchant *where any power* existed for its issue as negotiable paper, even when the source of its power is not disclosed or falsely recited.

Dillon Mun. Corps., Vol. 1, 541.
Ackley School Dist. v. *Hall*, 113 U. S. 139.
Thompson v. *Lee Co.*, 3 Wall. 331.
Cromwell v. *Co. of Sac*, 96 U. S. 51.
Commissioners of Marion Co. v. *Clark*, 94 U. S. 278.

Again, if their statements on each of these bonds are to be considered as binding recitals on the parties of the contract, then they are equally binding the promise to pay the $1,000 and interest, and the power to collect only the 1-20th of that amount are an absurdity, and we have a right but no power to enforce it, and a great wrong and no remedy. The reference in the bonds to the act that has the 1-20th of 1 per cent. statement, is not, and never was in an opinion intended to be an absolute limit to the taxing power of the respondent. It is a question of construction, and was placed there, as shown above, as an extra inducement for the sale of the bonds, and not in any sense as a limitation.

The respondent's position, that because of this claimed recital of absolute limitation on the taxing power of the county, 1-20th of 1 per cent. as the only rate of taxation that can legally be made is utterly untenable, for as shown *supra*, relator has a legal right to the use of every law, and the constitution then in existence to collect his bonds. The rule universally adopted in the construction of contracts is, *that the intent of the parties when the instruments were executed shall prevail.* By this rule it is determined whether a contract is dependent or independent. In a contract some of the covenants may be independent and others dependent.

Duncan v. *Charles*, 5 Ill. (4 Scam.) 561.

And lastly, whatever force in original suits may be given this claimed limiting clause, Sec. 13 of the act of Feb. 20th, 1865, it can have no force in this mandamus proceeding to

collect a general judgment against the respondent. The judgment concludes the respondent. The judgment is for a definite fixed sum, to-wit: $8,974.39 and interest since Nov. 25, 1884, and with no limitations whatever stated therein as to what entered into it, or how in should be paid. (Transcript of Records, pp. 4 and 7.) It therefore stands as a general judgment, and must be paid by taxation; and we have shown *supra*, latter part of Art. 10, Sec. 11, p. 81, Constitution of Missouri, Nov. 30, 1875; this class of indebtedness on bonds then outstanding, or renewal of bonds for existing indebtedness, *was specially exempted from the limitations imposed on the taxing powers of counties in first part of that Art. 10, Sec. 11, of the Constitution of Missouri of 1875.*

Respondent deems the case of *State ex rel.* v. *Shortridge*, 56 Mo., 1-6, and *U. S.* v. *Macon Co.*, 99 U. S. 582, as conclusive in the case at bar. But the case of Macon Co., 99 U. S., we think we have shown, was based on a misapprehension of exceptions to the limitations of the taxing power of counties in the latter part of Art. 10, Sec. 11, and has been overruled, for this and other reasons, by the doctrine of *U. S.* v. *Clark Co.*, 96 U. S. 211, and that this last case must stand as the law as far as it bears on this case as above stated, holding as we think that the reference in the bonds to the taxing power is not an absolute limitation of that power to 1-20 of 1% tax.

And the case of *State* v. *Shortridge*, held with the relator instead of against him, as decided by the court below in *U. S.* v. *Scotland Co.*, 32 Fed. Rep. 715.

We also refer the court to Secs. 17 and 18 of the general railroad law of Missouri, which we think gave full power for the issue of these bonds, and especially as to the taxing power to pay a general judgment obtained on railroad aid bonds and coupons, put into a general judgment, for certainly then no conditions or limitations as to a vote of the people or rate of taxation cited in the bonds could bar the collection of such a judgment.

It would be most inequitable and contrary to all rules of construction to hold the contract at one time dependant and at another time independent, or to hold that the obligation or contract in the bonds was dependent upon the 1-20 of 1% tax recital for their payment, when such a construction would render the whole issue of valid bonds practically worthless by reason of inability to collect them.

The obligation of a contract does not include the whole remedy.

2 Kent. Com. 397.
3 Story Com. Sec. 1392.
Cook v. *Moffat*, 5 How. 295.

The courts have held that the remedy was no part of the obligation.

Moore v. *Gould*, 11 N. Y. 281.
Wilson v. *Sparks*, 72 N. C. 208.
Edwards v. *Kenney*, 75 id. 409.

In *Edwards* v. *Kearzey*, 96 U. S. 604, the court says: "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract."

There is one other view to be taken of this case, and that is that equity does not allow a public municipality to subscribe for stock to a railroad company, receive and retain the same, and pay for it in bonds, only 1-20 of which can be collected.

Ill. Grand Trunk R'y Co. v. *Woods*, 140 U. S. 65.

We think we have shown that reference to the Act of Feb. 20, 1865, was in no sense an absolute limitation to the taxing power of the respondent. That no such construction should ever have been given it. That it is not a binding recital of power. That it has nothing whatever to do with the taxing power to pay a general judgment aggainst the respondent. That there was ample power for the issue of the bonds, and at the time they were issued ample authority of law in existence for the respondent to pay the relator's judgment in full, by taxation. If this be so, we ask this honorable court to correct the errors of the court below, and grant the prayer of the petition and order the respondent to levy a tax sufficient to pay relator's judgment and costs.

GEO. A. SANDERS,
For Relator.

MAR 29 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

October Term, 1891.

TERM NO 257.

THE UNITED STATES *Ex Rel.* JOSEPH E. JONES, PLAINTIFF IN ERROR.
vs.
THE COUNTY COURT OF MACON COUNTY AND THE JUDGES THEREOF.

CASE NO. 13340.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Statement, Brief and Argument of Defendants in Error.

BEN ELI GUTHRIE,
FOR DEFENDANTS IN ERROR.

TIMES POWER PRINT, MACON, MO.

Supreme Court of the United States.

October Term, 1891.

TERM NO. 257.

THE UNITED STATES EX REL. JOSEPH E. JONES, PLAINTIFF IN ERROR. vs. THE COUNTY COURT OF MACON COUNTY AND THE JUDGES THEREOF.	CASE NO. 13340.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Statement Brief and Argument of Defendants in Error.

STATEMENT.

(N. B. Figures in parenthesis refer to pages of printed record.)

The substantative averments of the plaintiff in error in his information and alternate writ are that "said judgment was recovered upon bonds and coupons issued by the said county in

part payment of a subscription made by said county on the 9th day of February, 1869, to capital stock of the Missouri & Mississippi Railway Company, duly organized under the laws of the State of Missouri; "*that said subscription was authorived by and issued under the 17th section, Chapter 63, of the General Statutes of the State of Missouri of 1866, then in force.*" (4, 5, 6.)

Both the information and writ allege that the relator has demanded the levy of a *special* tax upon all the property in said county made taxable by law, etc. (5, 6.)

The prayer of the information and the command of the alternative writ are that the Court is "commanded forthwith to levy a *special* tax upon all property in Macon county made taxable by law for county purposes and upon the actual capital that all merchants and grocers and other business men may have invested in businness in said county, and to cause the said tax to be collected in money, and when collected to apply the same to the payment and discharge of said judgment, interest and costs," etc. (5, 6.)

As relator in his information and writ averred he had a judgment against Macon county, without stating whether said judgment was general or special, so the repondents in their return admit that the "relator recover in this Court against Macon county, a judgment for," without saying whether said judgment was general or special.

The return then denies that the judgment was rendered on bonds or coupons issued under section 17, of chapter 63 of the General Statutes of Missouri, as in said writ alleged, or under or pursuant to any other General Statute of Missouri; respondent avers and charges the fact to be that said judgment of relator was based upon coupons detached from bonds issued by said

Macon County in payment of subscription to the capital stock of the Missouri & Mississippi Railroad Company, made by the County Court of said County of Macon, under and pursuant to the provision of the 13th section of an act of the General Assembly of the State of Missouri, entitled: "An act to incorporate the Missouri & Mississippi Railroad Company approved February 20, 1865, and without any other right, power or authority whatever." (7, 8.)

This allegation is fully admitted in the reply of relator in these words: "Except that the relator admits that his said judgment is based upon coupons detached from bonds issued by said County of Macon in payment of a subscription to the capital stock of the Missouri & Mississippi R. R. Co., made by the County Court of said County under and pursuant to the provision of the 13th section of an act of the General Assembly of the State of Missouri, entitled: "An act to incorporate the Missouri & Mississippi R. R. Co., approved February 20, 1865." (14.)

The return of respondents proceeds to allege that at the time of making said subscription and issuing said bonds neither the County nor the County Court thereof, nor any officer or agent thereof, under the Constitution, Laws or General Statutes of the State had any right, power or authority to make said subscription and issue said bonds and interest coupons without the assent of two-thirds of the qualified voters of said County voting at a genneral or special election held in said county for the purpose of obtaining said assent, except the authority conferred on the County Court of said County by said 13th section of said act of February 20, 1865, which said section is as follows, to-wit:

"Sec. 13. It shall be lawful for the corporate authorities of any city or town, or the County Court of any County desiring

so to do to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the asses sed value of the taxable property for each year."

The return then proceeds to allege that under said section, and by no other right, power or authority whatever the County Court on the 2d day of April, 1867, subscribed on behalf of the county the sum of of $175,000 to the capital stock of the railroad company, and from time to time to the first day of January, 1870, issued the bonds of said county with interest coupons attached in payment of said subscription. (8.) This is admitted in the answer. (14.)

That said subscription was so made and said bonds and coupons were so issued without the assent of two-thirds of the qualified voters of Macon County, no election regular, or special, havlng at any time been held in said county for the purpose of obtaining such assent, but that said action of the County Court was against the will of nine-tenths of the qualified voters of said county. (8.) This averment is admitted in the relator's answer. (14.)

The return avers that said judgment of relator is based in part upon 15 interest coupons detached from the bond so as aforesaid issued. (8, 9.)

That it is recited on the face of said bond that they were issued under the order of the County Court as authorized by said act of February 20, 1865, as it is alleged in the declaration and petition of the relator filed in this court on which relator, said judgment was rendered, and that the only part of said act conferring any authority of such kind is the said 13th sec-thereof which was the sole authority for issuing said bonds. (9.)

There follows in the return an averment of another issue of bonds with interest coupons attached to pay for a second

subscription to the capital stock of the railroad company on the 2nd day of May, 1870, to the amount of $175,000, which was done without the assent of two-thirds of the qualified voters of the county, no election, regular or special, having been held for the purpose of obtaining said assent. (9.) This the reply admits. (14.)

The return avers that said judgment of relator was based on 139 coupons, from this latter issue of bonds.

That said bonds recited that they were issued under said act of February 20, 1865; and that said section 13 was the sole authority under which they were issued or could be issued. (9, 10.)

That all said bonds were issued with express reference to the payment only out of the money to be derived from the levy of a special tax of one-twentieth of one per cent. each year upon the assessed value on all the taxable property of Macon County. (10.)

The relator admits in his answer (14,) that the 13th section of the act provides for the levy of the special tax of one-twentieth of one per cent. The return contends that the Macon County Court at the time of making said subscription and issuing said bonds and coupons had no authority and has no authority now to levy any other tax than said special tax of one-twentieth of one per cent, to pay said bonds and coupons.

That under said act the County Court has each and every year since the issuing of said bonds and coupons levied the special tax therein provided for and had such speeial tax collected for the purpose of paying said bonds and coupons. (10.) This allegation is fully admitted in the stipulation. (16.)

That the aggregate value of all taxable property in Macon

County has always been and is now less than six million dollars. This is all admitted in the stipulation. (15, 16.)

That the Constitution of Missouri limits the power of the County Court of Macon County in levying taxes for county purposes as follows:

"For county purposes the annual rate on property in counties having six millions dollars or less shall not in the aggregate exceed fifty cents on the one hundred dollars valuation." (10.) (Constitutien of 1875, Article X, Section 11, 97-98, I, Revised statutes of Missouri, 1889.) The answer admits this allegation (15.)

That at the time of issuing said bonds and coupons the County Court of Macon County was and ever since has been and still is limited in levying taxes for county purposes by the Laws and Statutes of Missouri to one-half of one per cent. on the assessed value of the taxable property of said county. (10.)

That the County Court have each and every year since said issuing of said bonds and coupons levicd and collected and still are levying and collecting said one-half of one per cent., which has been prudently and economically administered and applied according to law. (10.)

That the County Court has no legal authority to levy any other or greater taxes than the taxes hereinbefore stated, but they aver and charge the fact to be that they have fully and cowpletely exhaused all their power and authority, under the Laws of Missouri, to levy and collect taxes, and have never at any time refused to levy and collect any tax or taxes that they legally and lawfully might levy and they have no right, power, warrant or authority under the Laws of Missouri to levy and collect the tax directed in said alternate

writ, or to levy and collect any other or further tax or taxes than those in this return mentioned which they have at all times levied and still are levying and collecting. (10, 11.)

That respondents have no power or authority whatever to collect any tax or taxes in *money* as in said alternate writ directed, for they say that under the Laws and Statutes of Missouri the County Court have no authority over the collectors of taxes save to make, on receipt of the county treasurer, settlements with him for taxes collected and turned over to said treasurer, and allow him proper credit therefor, and they have no power or authority to direct or order the collector of taxes to take or receive money or any other thing whatever in payment of taxes.

That at the time of making both said subscription and issuing all said bonds and coupons and prior thereto, and ever since, the Laws and Statutes of Missouri specifically direct what and what only the collector of taxes shall receive in payment of taxes, and the County Court can give no directions whatever in the matter.

At the time of issuing said bonds and coupons, and both prior thereto and ever since, the Laws and Statutes of Missouri authorize and require all collectors of county revenue to receive all county warrants presented to him by the legal holders thereof in payment of any county revenue, license, tax, assessment, fine, penalty or forfeit existing against said holder and accruing to the county issuing said warrant, and the County Court has no power to make any order or direction in contravention of such statute.

The relators answer to this return "denied each and every allegation thereof inconsistent with his petition, except that relator admitted" etc. Then follows the admission herein before referred to. It then proceeds:

"But relator avers the fact to be that at the time of the issue of the bonds and coupons included in this judgment that the County Courts of the State of Missouri had a general power fo audit and settle all demands against the county and to levy such sums as were necessary to defray the expenses of the county, including judgment against it as found in Wag. St. Sec. 9, p. 441, and Sec. 165, p. 1193.

"Relator further avers that his judgment is a valid and binding debt of the County of Macon; that County Court had power to levy a tax to pay the debt when it was contracted, as found in the Statutes above referred to, and that power has not been and could not be taken away so long as his debt contracted while that law was in force, is unpaid."

The cause was submitted to the Court on the 5th of March, 1888, on the pleadings and a stipulation waving a jury and admitting certain facts as follows:

"It is agreed and stipulated by and between the parties to the above entitled cause that this cause is submitted to the Court on the pleadings, and jury is hereby waived.

"And it is further admitted that the assessed valuation of Macon County has at no time reached six million dollars, but has at all times been less than that amount; that said county has every year since the year 1866 levied and collected one-twentieth (1-20) of one per cent. on the assessed valuation of all the taxable property of said county, and has applied the same to the payment of the bonds issued under the act of Feb. 20th, 1865, chartering the Missouri & Mississippi Railroad Company, but no such payment has been made on any bonds or coupons in this suit.

"That relator files brief and agrees to furnish respondent copy of same in ten days, and after service of such copy re-

spondents shall have twenty days to file brief, and relator has fifteen days to reply to such brief of respondent, each party to furnish the oher copies of such briefs.

"That the proceeds of the said tax of one-twentieth of one per cent. *is* annually about twenty-five hundred dollars, and that the same *has* been absorbed by coupons, warrants issued on judgments rendered on bonds and coupons of said county, issued under said act of February 20th, 1865, and that there are now registered against the fund arising from said tax warrants so issued to the amount of between forty and fifty thousand dollars." (15, 16, 17.)

On the 28th day of May, 1888, at the regular May term, the Court decided the case, finding for the respondents, and refusing to grant a peremptory writ as prayed for and dismissing the proceeding at cost of the relator, and entered judgment to that effect. (19.)

The Court found that the judgment of relator was based on coupons of bonds issued by Macon County pursuant to power confer by the 13th section of an act passed on February 20, 1865, to incorporate the Missouri & Mississippi R. R.

The relator took no bill of exceptions; and neither at the time of announcing the finding by the Court nor at the time of the entry of the judgment did he make any exceptions to the finding or ruling or judgment of the Court. But on the 18th day of June, in vacation of the May Term of the Court, he filed his petition for a writ of error and therein for the first time notes an exceptions to the judgment or to any ruling or proceeding in the cause, and in that petition makes an assignment of errors as follows:

"The Court erred in not ordering the peremptory writ to issue as prayed in relator's petition.

"The Court erred in refusing to grant the premptory writ ordering a sufficient tax levied as prayed for in relator's petition to pay his judgment, and in discharging the respondent.

"The Court erred in rendering judgment against the relator for costs in the case, and in favor of respondent." (19, 20.)

On the 11th day of September, 1888, the court granted the writ of error prayed for, and issued the citation which was served on the 1st of October. (21, 22.)

On the 5th of. October, 1891, the plaintiff in error filed in this court another and different assignment of errors, as it would appeared from the printed transcript. (22, 23.)

The Court will find a copy of the plaintiff's petition in the original suit, following the brief, appendix A.

STATUTES INVOLVED.

In addition to the foregoing statement and pleadings and stipulations there is appended the following statutes and Constitutional provisions, which are mentioned in the pleadings and referred to in the brief of counsel, to-wit:

CONSTITUTION OF 1865.

"Section XIV. The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein, shall assent thereto."—Article XI, Constitution of Missouri; General Statutes of Missouri, 1865, page 43.

RAILROAD COMPANIES.

"Section 17. It shall be lawful for the County Court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to any railroad company duly organized under this or any other law of the state; *provided*, that two-thirds of the qualified voters of said county, city or town, at a regular or special election to be held therein, shall assent to such subscription.

Section 18. Upon the making of such subscription by any county court, city or town, as provided for in the previous sec-

tion, such county, city or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed by this chapter, or by the charter of the company in which such subscription shall be made; and in order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court or city council, or trustees of such town, making such subscription, to issue their bonds, or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city or town, to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in any one year, in any county, city or town, shall not exceed thirty per centum of the subscription made by such county, city or town.

Section 22. Any County Court refusing to perform any of the duties required of it by this chapter may be proceeded against by writ of *mandamus*, to be sued out of the Circuit Court for the county so refusing.

General Statutes of 1865, Chap. 63, page 338-339.

CHARTER OF MISSOURI & MISSISSIPPI RAILROAD COMPANY.

"Section 13. It shall be lawful for the corporate authorities of any city or town, the County Court of any county dersiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed

value of taxable property for each year."—Approved February 20th, 1865.—Laws of Missouri, 1865, page 88.

COUNTY COURTS.

SEC. 9. The said courts shall, moreover, have the control and management of the property, real and personal, belonging to the county; and shall have full power and authority to purchase, or receive by donation, any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels, belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."—1 Wagner's Statute, 1872, page 441.

SEC. 28. Each County Court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money fouud due by the county; to enforce the collection of money due the county; to order suit to be brought on the bond of any deliquent, and require the circuit attorney for the county to commence and prosecute the same; to issue all the necessary process to secure the attendance of any person, whether party or witness, whom they may deem necessary to examine in the investigation of any account.

SEC. 31. When the Court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor, in the following form:

Treasurer of the county of ..... pay to..... dollars, out of any money in the treasury appropriated for county expenditures, (or express the particular fund, as the case may require.) Given at the court house, this..... day of, 18 ..... By order of the court.

TEST: C. D., clerk. A. B., president.

General Statutes 1865, 229 and 230.

2 Revised Statutes 1879, Sec. 5388 and 5394. p. 1061-2.

1 Revised Statutes 1889, Sec. 3185 and 3191, p. 804-5.

STATE TAX.

SECTION 1. That the annual taxation for the years 1867 and 1868, for the purpose of revenue, shall be at the following rates: First, on all male white persons over twenty-one and under fifty-five years of age, fifty cents; second, on all lands and other property, real and personal, made taxable by law, twenty-five cents on the one hundred dollars of the assessed value thereof; third, all arrears and delinquencies of military taxes shall be assessed and collected.

Session Acts of 1867, p. 157. Approved March 12th, 1867.

SECTION 1. There shall be annually levied, assessed and collected, on the assessed value of all the real estate and other property subject by law to taxation in this state, one-fourth of one percentum for state revenue, and one-fourth of one percentum for the payment of all state indebtedness.

SEC. 2. Repeals all inconsistent laws.

SEC. 3. This act shall take effect from and after its passage.

Approved February 16, 1869.

Laws of 1869, p. 81;

Sec. 10, p. 1161, 2 Wager's Statutes, 1870.

SEC. 7. There shall be annually levied, assessed and collected on the assessed value of all the real estate and personal property subject by law to taxation in this state, one-fifth of one

per centum for state revenue, and one-fourth of one per centum for the payment of all state indebtedness.

2 Wagner's Statute, p. 1159.

Acts 1871-2, p. 84.

Approved January 8, 1872.

COUNTY REVENUE.

"SEC. 165. The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for state purposes, except what is herein excepted by this act, but the county tax shall in no case exceed one-half of one per cent. on all taxable property, and on all licenses made taxable by law the county tax shall not exceed the state revenue tax more than one hundred per centum for the same time, but the county court of St. Louis county is empowered to impose such additional taxes to pay fines and for other purposes, as may be prescribed by law. The state interest tax not to be construed to be state revenue tax."

2 Wagner's Statutes 1872, p. 1193.

SEC. 76. The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for state purposes, except what is herein excepted by this act; but the county tax shall in no case exceed the state revenue tax on the same subjects of taxation more than one hundred per centum at the same time; but the county court of St. Louis is empowered to impose such additional taxes to pay fines and for other purposes as may be prescribed by law.

2 Wagner's Statutes 1870, p. 1196.

Laws of Missouri 1868, p. 142, Sec. 2, approved January 30th, 1868.

SEC. 11. Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valution of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars' valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars' valuation; in counties having ten million dollars and under thirty million dollars said rate shall not exceed fifty cents on the hundred dollars' valuation; and in counties having thirty million dollars or more said rate shall not exceed thirty-five cents on the hundred dollars' valuation.

* * * * * *

Said restrictions, as to rates, shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing on bonds which may be issued in renewal of such indebtedness.

Article X, Constitution of 1875, Revised Statutes of 1889, p. 97; Revised Statutes of 1879, p. LXXX.

SEC. 6807. *Extent and limitation of taxes to be levied.* For county purposes, the annual tax on property, not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof, shall not in any county in this state exceed the rates herein specified: In counties having six million dollars or less, said rate shall not exceed fifty cents on the hundred dollars valuation: in counties having six million

dollars and less than ten million, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and not exceeding thirty million, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars, or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. The rates herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for state and county purposes.

2 Revised Statutes 1879, p. 1337

Same Section, 2 Revised Statutes 1889, Sec. 7662, p. 1777.

TAXES PAYABLE IN WHAT?

SEC. 114. All state and county taxes shall be paid in gold or silver coin, United States legal tender notes, national bank notes or auditor's warrants. Coupons of county bonds and jury certificates may be received in payment of county tazes.

2 Wagner's Statutes, 1872, p. 1182,

2 Revised Statutes, 1879, Sec. 6750, p. 1324.

2 Revised Statutes of 1889, Sec. 7604, p. 1762.

SEC. 46. Hereafter every officer or person intrusted with the collection of any county or city revenue in this state, is hereby authorized and required to receive all county and city warrants presented to him by the legal holder thereof in payment of any county or city revenue, license, tax, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing said warrants.

General Statutes of 1865, p. 232.

The section is substantially the same in Revised Statutes of 1855, p. 530, Sec. 7, Chap. 47.

Revised Statutes 1845, p. 314, Sec. 7.

It is the same in 1 Wager's Statutes, 1870 and 1872, Sec. 46, p. 417.

2 Revised Statutes, 1879, Sec. 5408, p. 1064;

1 Revised Statutes, 1889, Sec. 3205, p. 807.

JOINDER IN ERROR.

Now comes the defendants in error and say that there are no such errors in the record and proceedings of the trial Court as is by the plaintiff in error alleged.

POINTS AND AUTHORITIES.

I.

This record shows no exception to any ruling of the Court at any time during the progress of the trial, nor at the announcement of the finding, nor entry of judgment. There is no bill of exceptions and there is nothing for this Court to review, except the bare record proper.

Graham v. Bayne, 18 How., 60.

Guild v. Frontin, 18 How., 135.

Kelsey v. Hotchkiss, 21 How., 85.

Campbell v. Boyreau, 21 How., 223.

Norris v. Jackson, 9 Wall., 125.

Kerr v. Clampitt, 95 U. S., (5 Otto.), 188.

Kearney v. Denn 15 Wall., 51.

II.

Under Section 649, Rev. Stats. U. S., 2d Ed., 1878, p 118; when the case is, on stipulation, submitted to the Court, the finding of the Court, which may be either general or special, shall have the same effect as the verdict of a jury.

Under Section 700, p. 131, the rulings of the Court in the progress of the trial of the case, if excepted to at the time, and duly presented in the bill of exceptions, may be reviewed on writ of error.

In this case there was a stipulation submitting the case to the Court, (15), and the Court made a general finding for the respondents, (19), and there being no bill of exceptions, this Court will not review said finding.

Town of Walnut v. Wade, 103 U. S., (13 Otto.),683.

Prentice v. Stearns, 113 U. S., 435.

The stipulation (15, 16,) is not an agreed statement of facts.

Wayne County v. Kennicott, 103 U. S., 554.

It does not purport to be an agreed statement of facts. It simply agrees that the case will be submitted to the Court on the pleadings, and without a jury, and that certain facts are true, and by its terms excludes the idea that the case is submitted to the Court on the facts contained in the stipulation.

Again: It is not made, nor does it purport to be made, nor is there any attempt to make it a part of the record, or to spread it upon the record. It is simply *filed*, (15.)

"An agreed statement of facts must be made a part of the record of the case."

Burr v. Des Moines Navigation and R. R. Co., 1 Wall., 99.

This stipulation is merely a paper in the case, and can only be made a part of the record by a bill of exceptions. By this paper it is not stipulated nor agreed that it be embodied in the record for the purpose of appeal, and it must be made a part of the record in some way in order to become an agreed statement of facts that this Court can notice. This Court can only notice it under Section 649, as authorizing the trial Court to hear the case without the intervention of a jury.

Head v. Hargrave, 105 U. S., (15 Otto.), 45.

Nor does the stipulation purport to contain all the facts which the Court should consider in its hearing and decision of the cause, but it clearly refers to other facts which the Court was to find from the pleadings. It imposed upon the Court the duty of going through the pleadings and determining from them what were the facts, and making the finding on those facts, either for the relator or the respondents. It is not an agreed statement of facts.

Again: This is not an original proceeding. It is merely final process in a pending case. In considering and passing upon it the Court would be compelled to take into consideration the record in the case. The Court is conclusively presumed to know its own record, especially in a case it is trying. The judgment of the relator was a part of the record in this cause, and must have been before the Court in passing upon the matters at issue, and must have been considered by it.

Again: The pleadings in the main action which resulted in the judgment, is a part of the record in this cause, and the Court must likewise have known the allegations in that petition, considered them, and passed upon them. The relator has not seen fit to bring to this Court his judgment, nor the pleadings on which it is founded. This case is a part and parcel of that case, and draws its life and vitality therefrom. In fact it is that case. The two proceedings, if it be proper to use the word "two" in the connection, make but *one* case—*one* record. This Court cannot pass upon an incomplete record.

Redfield v. Parks, 130 U. S., 623.

III.

This record is entirely devoid of any exception made by the plaintiff in error at any time until after the entry of the

judgment. "Where an action at law is tried by the Circuit Court, without a jury, and the facts on which, on a writ of error, the plaintiff in error seeks to raise a question of law, are not admitted in the pleadings, or specially found by the Court, and there is a general finding for the defendant in error, on the cause of action which involves such question of law, and there is no exception by the plaintiff in error to any ruling of the Court in regard to such question, this Court can make no adjudication in regard to it."

Connty of Otoe v. Baldwin, 111 U. S., 1.

Exceptions must affirmatively appear to have been taken during the trial, and where it appears that they are taken after the trial, submission and announcement of the finding and the entry of the judgment, they come too late and will not be considered by the reviewing Court.

Hanna v. Maas, 122 U. S. 24 ,

The judgment in this case was entered on the 28th day of May, 1888, (see page 19 and 17,) and afterwards on the 18th day of June plaintiff in error filed his application for a writ of error, in which appears the first exception in all the record. This is clearly too late.

Pac. Exp. Co. v. Malin & Colvin, 132 U. S., 531.

U. S. v. Carey, 110 U. S., 51; and cases cited.

The petition for a writ of error form no part of the record. And this record stands without an objection made or an exception saved.

Clark v. Pennsylvania, 128 U. S., 395.

Boom Company v. *Boom Company*, 110 U. S., 57.

Warfield v. Chaffe 91 U. S. (1 Otto.), 690

IV.

Error must appear in the record before the appellate court will reverse the judgment. All presumptions are in favor of the legality of the judgment, and plaintiff in error must show a specific error in the record before he is entitled to a reversal.

Suydam v. Williamson, 20 How., 427.

Northern Pac. Railroad Co. v. Herbert, 116 U. S. 642.

Kearney v. Denn, 15 Wall, 51.

Bagnell v. Brodrick, 13 Peters, 436.

V.

Finding of facts by the lower court are conclusive upon the appellate court.

City of St. Louis v. Rutz, 138 U. S., 226.

St. Paul Plow Works v Starling, 140 U. S., 184.

Zeckendorf v. Johnson, 123 U. S., 617.

Hathaway v. First National Bank, 134 U. S., 494.

VI.

Relator in his answer pleads as follows: "The relator, by way of answer to the return of respondent, denies each and every allegation thereof inconsistent with his petition etc." (14)

It is respectfully submitted that this is not a denial. A denial should deny expressly, either by general or specific denial, the averments that it intends to traverse, and not in this indefinite way, leaving it wholly uncertain as to what he intends to deny and what he intends to admit; making it a matter of inference about which counsel and even the court may have different views.

Bliss on Code Pleading, Sec. 131 and 131 "a."

Edmunson v. Phillips, 73 Mo., 57.

Collins v. Trotter, 81 Mo., 275.

Smith . Ledsey, 89 Mo., 76.

This denial was evidently bad pleading. While respondents made no objection to it below, yet it left the question open for the court to determine what the allegations of the return were that were not inconsistent with the relator's petition. How the trial court determined this question, this court cannot now tell, and if it could, it could not review or revise that finding, since no objection was taken thereto below.

Plaintiff in error is bound by the finding of the court, and this court has no means of revising it, and would not, if it had the means.

VII.

The substantive averment of relator's information (5) and the alternative writ (6) is that "said subscription was authorized and issued under the 17th section of chapter 63 of the General Statutes of the state of Missouri of 1866, then in force."

The prayer in the information and the mandatory clause of the writ follow the language of sectfon 18, chapter 63 of the General Statutes of 1865, page 338.

The recitals and mandate of the writ do not pursue the language and verbiage of section 165, page 1193 of 2 Wagner's Statutes of 1872; nor of section 76, p. 1196, 2 Wagner's Statutes of 1870; Acts of 1868, page 142.

It is clear that in his writ, relator founds his right of relief on the former Statutes, sections 17 and 18, chapter 63; but in his answer to the return (15) he abandons his writ and seeks to substitute the General Revenue Law in lieu thereof. This wholly changes the foundation of his cause of action, and constitutes a fatal departure.

1 Chitty's Pleading (11 Am. ed.), p. 643, [644].

A litigant cannot declare on one cause of action and prove and recover on another but different cause of action.

Feurth v. Anderson, 87 Mo., 354.

Clements v. Yates, 69 Mo., 623.

Newham v. Kenton, 79 Mo., 382.

Leslie v. Railroad, 88 Mo., 50.

Hammerslough v. Cheatham, 84 Mo.. 13.

Irwin v. Chile's, 28 Mo., 576.

Reeds v. Bott, 100 Mo., 62;

O'Bryant v. Western Steel Co., 100 Mo., 182, 189.

The People v. Renson, 2 N. Y., (2 Comstock), 490.

VIII.

If the admissions in relator's answer (14) and in the stipulation (15 and 16) are correct, (and they evidently are by the whole record and by the bond which relator sets out on page 5 of his brief, *although it is not found in the record*), then respondent had no right or power to levy a tax under section 17 of chapter 63. Such a levy would have been void. In making such a levy, respondents would have violated their oaths of office and been guilty of malfeasance in office, because on the facts in the return and answer there was no authority to levy a tax under chaper 63 to pay relator's bond and coupons, or his judgment founded thereon.

Respondents could not obey said writ, and must therefore make a return of their want of authority to obey the same. Having done so, can they then for the first time be told to levy under a different Statute, with a different purpose, and requiring different applications and treatment of the funds arising therefrom?

Compare section 18, chapter 63, of the General Statutes of 1865, page 338; section 165, page 1193, 2 Wagner's Statutes of 1872; High's Extraordinary Legal Remedies, sections 536, 537 and 538, pages 378, 379 and 380.

IX.

The reply contradicts the writ and corroborates the return in admitting that the bonds were issued under the 13th section of the charter of the M. & M. R. R. Co., (14), and without the assent of the qualified voters of the county. This is another fatal departure.

See authorities, *supra*.

Let there be a levy under the 17th section of chapter 63. The tax-payer resists and traverses the authority to make the levy. The collector offers in evidence the order of the county court making the subscription, the issuing of the bonds, and also the bonds themselves and the charter of the railroad company. Would they tend to prove the allegation of the collector's declaration that the bonds were issued under chapter 63? Would they not rather specifically contradict that allegation?

Canal Trustees v. The People, 12 Ill., 254.

The People v. Kenson, 2 N. Y., 490.

X.

But the admission of the bonds being issued under the 13th section of the railroad charter does not show authority on the part of the county court to levy under section 165 of the General Revenue Law, unless there was some specific averment in the alternative writ showing that the county court would be authorized under that section to levy to pay the bonds in question, and the judgments rendered thereon. But there is no such averment in the writ, and we hear of it for the first time in the

answer. Can the relator recover on allegations in his answer which contradiet the recitals of the writ?

Again: the law requires the relator to make a demand on the county court to make the levy to pay his judgment, and he in his writ avers that he did make the demand, but that demand was to levy under the 17th section of chapter 63, which he wholly abandons by substituting section 165 of the Revenue Law.

Demand should be express and distinct, and should clearly designate the precise thing which is required.

High's Extraordinary Legal Remedies, § 13, page 14.

On this record there can be no question for this court to review, except the writ, the return, the answer and the judgment; or to put it more tersely, the relator can here only question the legal sufficiency of the return. No other question of fact or law arising on this record.

But can the relator now by writ of error or otherwise assail the legal sufficiency of the return? He neither demurred to it, nor moved to quash it, but admitted its legal sufficiency. He plead to it, and attempted to raise an issue of fact. He submitted that issue to the court sitting as a jury, and was defeated thereon, and he is now estopped to question the sufficiency of the return in law.

High's Extraordinary Legal Remedies, section 494, p. 355; section 496, p. 357.

The People v. The Board of Metropolitan Police, 26th N. Y., 316.

People v. Finger, 24 Barber, 341.

But relator's writ is insufficient under chapter 63. It does not allege that the levy of a sufficient amount to pay his

judgment, would not increase the levy for that year beyond 30 per centuum of the total subscription.

XII.

The writ of mandamus is a legal remedy to compel the performance of a duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and undisputable, but both requisites must concur in every case.

Bayard v. The United States, 127 U. S., 246.

Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act.

Brownsville v. Loague, 129 U. S., 493.

XIII.

Unless specific power is granted to a county, it has not the power to make subscriptions or donations to corporations, or to issue bonds therefor.

City of Ottawa v. Carey, 108 U. S., 110; and cases cited.

Cooley's Constitutional Limitations (3rd ed.), 244, (* 215).

Police Jury v. Brittain, 15 Wallace, 556.

Mere municipal corporations, constituted for the purpose of local police and administration, and having the power of levying taxes to pay all public charges created, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred, or clearly implied from some power expressly given, which cannot be fairly exercised without it.

Town of Concord v. Robinson, 121 U. S., 165.

Claiborne County v. Brooks, 111 U. S., 400.

XIV.

Power to issue bonds does not necessarily imply power to levy taxes sufficient to pay them.

United States v. Town of Cicero, 41 Fed. Rep., 83.

2 Dillon's Municipal Corporations (2d ed.) (505-6), No. 518.

1 Desty on Taxation, Sec. 98, 472-5-8.

Counties have no inherent power to levy taxes, but they may be invested with such power by legislative enactment; the statutes conferring such power are to be strictly construed, and the grant of power be plain and unmistakable.

2. Desty on Taxation, Sec. 161, p. 1053-1076.

XV.

Reference to the act in the bond gave notice as to the limitation contained in the act as fully as if the act itself had been set out on the face of the bond.

McClure v. Oxford Township, 94 U. S., 429.

Northern National Bank v. Porter Township, 110 U. S., 608.

One who contracts with a County or with its officers is bound at his own peril to know the limitations of their authority.

Farnsworth v. *Pawtucket*, 13 R. I., 32.

United States v. *the Town of Cicero*, 41 Fed. Rep., 83.

XVI.

It devolves upon the relator to show a "thus saith the law" before he is entitled to a special tax to pay his judgment. His writ demands the special tax under the 17th section of chapter 63, General Statutes of 1865. But he alleges in his declaration,

when seeking his judgment, that his bonds were issued under another and different law, (see appendix A,) to-wit: the act of February 20th, 1865, and re-admits the same fact in his answer to respondents' return. Said act clearly prescribed another and entirely different measure, mode and manner of payment, from the general railroad law on which Relator's writ founds his right to a special tax.

Has Relator established a clear right to a special tax under the general railroad law of 1865? If not, he is not entitled to his peremptory writ.

High on Extraordinory Legal Remedies, (original edition), p 11, 12 and 13, Sec. 9 and 10; also p. 379, Sec. 537, *et seq*, p. 338, Sec. 548.

Courts can "by mandamus only compel corporate authorities to levy a tax in conformity with the mode prescribed and to the extent of the power conferred by law, but beyond this no court can go."

State ex rel Wilson v. Rainy, 74 Mo., 229; 236 *et seq.*

Relator's writ, the basis of his action and upon which he must recover, if he recovers at all—grounds his right of belief on an alleged power of taxation, which the pleadings, both prior and subsequent, allege and admit has in fact and law no existence at all, nor ever had. If this writ can go at all it must go with the same recitals of right and with the same mandate as the alternative—the vital, life-giving averment of which is admittedly and confessedly false. This cannot be.

School District v. Lauderbugh, 80 Mo., 190-9.

State ex rel K. C., St. J. & C. B. R. R. Co., 77 Mo., 143-7.

Hambleton v. Town of Dexter, 89 Mo., 188.

With the facts as admitted in Relator's answer before the county court (and they were before the county court, and it was bound in the discharge of its duty to know these facts), the court was bound to know that Relator was not entitled to a writ under the General Revenue Law. They could only look to the writ for what relator claimed. They knew the recitals of the writ were false, as the Relator has since admitted them to be. It was then their duty to refuse to obey the writ. They could not look beyond the writ to find some other law under which they could levy the tax. The respondent isn't required to look "*de hors*" the writ to ascertain his duty.

Hartshorn v. Assssors, 60 Me., 281.

Again: The levy under the revenue law would not have been in obedience to the writ, and would have been a violation of the command of the writ.

XVII.

But in no event could the relator be entitled to a special levy, for which he prays, under the General Revenue law, section 165, p. 1193, 2 Wagner's Statutes, 1872.

First. Because his writ nowhere alleges that the county court of Macon county hasn't exhausted its power under said section. The presumption is that the county court has done its full duty in the premises, and said presumption remains and prevails until the contrary is made to appear. The writ must set out the clear right of Relator, and the corresponding clear legal duty of respondents.

High's extraordinary Legal Remedies, Sec. 10, p. 13; Sec. 537, p. 379; Sec. 382, p. 270.

Second. Because said writ does not allege that there was a failure on the part of the county court to levy to the highest limit allowed by said section for any particular year, or years,

or series of years. Said allegation should be made in the writ and in an issuable form. Respondents are entitled to be shown by the writ the specific authority for the act they are commanded to do.

Hambleton v. Dexter, 89 Mo., 188-91.

High on Extraordinary Legal Remedies, Sec. 536-7-8, pages 378-79-80.

Third. Because the mandatory clause of the writ should set out what year, or years, or series of years, such required taxes were to be levied, so that respondents could (a) see and determine whether or not they had already exhausted their power under said section for such year or years, by having already levied the maximum rate allowed; and (b) in order that they may legally and properly levy such taxes and extend the same on the tax books for the proper years. For, by the terms of the section this is an *annual* tax, with a maximum *limitation*. Respondents would have to look "*de hors*" the writ to find out for what years, if any, they can legally levy said taxes.

High on Extraordinary Legal Remedies, Sec. 538, p. 381.

People v. Brooks, 57 Ill., 142.

Besides the tax-payer has a right to know for what year he is paying taxes, and under what law, and for what purpose. His receipts might show taxes paid to the maximum rate for the given year.

Fourth. Because the relator does not allege that the levy of the tax required to pay his judgment would not exceed the limit imposed on respondents by said section 165, nor can the court from the papers in the case determine that it would not exceed such limit, especially when taken with the necessary annual expenditures of the county, which the return alleges

absorbed all the annual revenue of the county, and which must be met and provided for in order to keep the county government going.

The return shows (10) and it is stipulated (15 and 16) that the assessed valuation of the county is less than six millions, but it no wheres appears what the assessed valuation is.

The relator must make a clear case, and not leave the court to conjecture. The right to tax is *strictissimi juris*.

East St. Louis v. Zebley, 110 U. S., 321.

Clay Co. v. McAller, 115 U. S., 116.

Harshman v. Witerbottom, 123 U. S., 215.

Fifth. Relator admits in his answer that his bonds were issued on the 9th of February, 1869, and on the 2d of May, 1870. By reference to the Statutes heretofore quoted, *ante* .....it will be well to observe: (a) By act of March 12th, 1867, the annual tax for state purposes was twenty-five cents on the one hundred dollars valuation. (b) By the act of January 30th, 1868, the county tax shall in no case exceed the state revenue tax * * * more than one hundred per centum for the same time. (c) The act of Feb. 16th, 1869. fixes the state taxes at one-fourth of one per cent. for state revenue. (d) The act of January 8th, 1872, fixes the state revenue rate at one-fifth of one per cent., and these rates have continued ever since. (e) The Constitution of 1875, art. x, sec. 11, fixes the maximum rate at fifty cents on the one hundred dollars for county purposes.

From this legislation, it is apparent that at no time since April, 1867, has county court had authority to levy more than fifty cents on the one hundred dollars valuation. The return shows that the Macon county court has always levied said

amount, and there is no allegation in the writ that said amount has not been fully levied and collected.

XVIII.

Section 9, page 441, 1 Wagner's Statutes, cited by relator, can avail him nothing, as it only confers upon the county court the power and duty to "audit and settle;" that is, adjust, find the amount due, but is absolutely silent as to any power to tax. Relator is not now seeking to have his bonds and coupons audited and adjusted. Macon county court would have done that for him any time since their maturity if he had only presented them. He has relieved them of that duty by having the Circuit court audit and adjust his demands against Macon county.

Under the laws of Missouri the "auditing and settling" of a demand against the county does not by implication even tend to raise the power to tax in the court, but the Statute expressly provides for in another and very different thing and act from that of taxing, to-wit: To issue a warrant for any balance due from the county.

General Statutes 1865, 229 & 230, sec. 28 and 31.

1, Wagner's Statutes, pp. 414 and 415, sec. 28 & 31.

2, Revised Statutes, 1879, pp. 1061 & 1062, secs. 5388 & 5394.

1. Revised Statutes, 1889, secs. 3185 & 3191, pp. 804-5.

When the county court has issued a warrant for the balance remaining due, its power is exhausted, save as it is empowered under section 165, p. 193, Wagner's Statutes, 1872, to annually levy a tax at the May term to meet the annual expenditures of the county, not to exceed one-half of one per cent., which sum the county court of Macon county has always levied and it has been collected as the return amply shows.

XIX.

The mandatory clause of the writ further directs the court to collect said taxes in money, and apply the same to the payment and discharge of the judgment, &c. If in any event the relator should be entitled to levy under the general revenue law, the above part of the mandatory clause is illegal, and could not be granted or enforced without a manifest violation of law.

First. The primary and sole object of the power granted by said section to tax, is to raise money to defray the ordinary expenses of running the county government, and without such money—the pulsating heart and life sustaining blood of the county—its goverment must cease, die, and civil discord and the antithesis of government—anarchy—reign. How much of that tax is necessary or should be applied to the current expenses of the county is imposed by law and common sense on the county court, is committed to their discretion, and this court cannot and will not interfere with the exercise of that discretion.

High on Ex. Legal Remedies, p. 38 to 42, sec. 42 to 48.

The county court must—it cannot without abdicating its duty, fail to exercise its sound judgment and discretion, as to what amount of that tax is necessary for current expenses, and their discretion cannot be controlled by mandamus.

State ex rel Granville v. Gregory, 83 Mo., 123–36.

State ex rel Watkins v. Macon County, 68 Mo., 42 to 48, and cases cited.

Clay County v. McAleer, 115 U. S., 616–19.

East St. Louis v. Zebley, 110 U. S., 321–4.

These cases hold that the question of what expenses are proper and necessary for municipal administration is not judi-

cial; it is confined by law to the discretion of the municipal authorities. No court has a right to control that discretion, much less to usurp and supersede it. And more to the same effect.

How, on the face of this record, could the Circuit Court determine what part of the revenne was necessary for current expenses? What could it tell of the condition of the public buildings, roads, poor houses, farms, bridges and other absolutely necessary and pressing demands too numerous to mention, to say nothing of the administration of justice in the courts of the county.

The relator must make a case of clear right on paper, and on the facts, before he is entitled to his writ. And such a writ should be granted with caution, and the court in case of doubt should refuse, and may, though the right be clear, refuse it in its sound discretion,

High on Ex. Legal Remedies, p. 9, sec. 6, and p. 11, sec. 9.

State ex rel v. R. R. Co., 77 Mo., 143-7.

Second It is worthy of note, that the word "debt" does not occur in the statute, but the words "expenses" and "annually" do. And this is especially noteworthy, when considered in connection with the fact that the verbiage of the section is and has remained the same ever since the revision of 1825, when railroad debts and county bond debts were unknown in the state. Counties are not created to make debts, but to act as and be agencies of the government.

State v. Macon Co., 68 Mo., pp. 42-4.

Third. While these considerations might not defeat a mandamus for a county warrant, they are certainly sufficient to defeat, a tax and its application as commanded in this writ.

Fourth. We confidently assert that no warrant of law can be found authorizing the county court, when levying taxes under section 165, p. 1193, Wagner's Statutes, or its various amendments, to direct in what such tax shall be collected. That is a matter of law, and no order the county court could make in contravention of such a law would be binding on the collector.

County taxes are payable in county warrants, coupons and county bonds, and jury certificates.

2 Wagner's Statutes, 1872, Sec. 114, p. 1182;

2 Revised Statutes, p. 1324, 1879, Sec. 6750.

2 Revised Statutes, 1889, Sec. 7604, p. 1762.

Sec. 3205, p. 807, 1 Revised Statutes 1889, makes the unqualified requisition on the collector of county revenue to receive county warrants.

2 Revised Statutes 1879, Sec. 5408, p. 1064.

See same Sec. in identically the same words, General Statutes 1865, Sec. 46, Chap. 39, p. 232

It appears in substantially the same form in Revised Statutes 1855, Sec. 7, p. 530.

It also appears in Revised Statutes of Missouri, 1845, Sec. 7, p. 314. See also Statutes 1835, Sec. 7, p. 153.

And could doubtless be traced to the Revision of 1825, if the books were at hand—a day before railroads and stock subscriptions by counties were thought of.

The tax under sec. 76, chap. 13, General Statutes, 1865, is peculiarly a county tax, and the collector is compelled to receive county warrants, and any order directing him to do otherwise would be unavailing.

Harshman v. *Winterbottom*, 123 U. S., 215.

United States ex rel Huidekoper v. *Macon County Court*, 45 Fed. Rep., 400.

Then this writ, clearly being bad as to this point of collecting and paying in money, must be denied.

When mandamus is from its very purpose partly illegal and partly not, the Court will not enforce it by peremptory writ, or limit its effect, but will quash it.

Hartshorn v. *Assessors*, 60 Me., 281.

School Dist. v. *Lauderbaugh*, 80 Mo., 190; 195.

High on Extraordinary Legal Remedies, secs. 537–8–9, p. 379 to 382.

State ex rel v. *R. R. Co.* 77 Mo., 143–7.

XX.

But the return shows that county revenue tax of one-half of one per cent. and the special railroad tax of one-twentieth of one per cent. have been regularly levied. This exhausts the power of respondents. They can do nothing more. They are not in default. They owe relator no duty. If he has not received the benefit of their action, he must look elsewhere and not to them, for they have gone to the full extent of their power in the premises.

Bass v. Taft, 137 U. S., 458.

Ex parte Rowland, 104 (14 Otto.) U. S., 608.

XXI.

It is a conceded and undisputed fact on the record that the bonds and the coupons on which relator's judgment was founded were issued under the 13th section of the charter of the M. & M. R. R. Co. (7-8-9-10-14-15) and under no other authority whatever.

The judgment is silent as to the remedies and the mode, manner and measure of taxation to satisfy it. Though this contract be merged in the judgment, yet the original contract can be shown, notwithstanding the merger, to determine the extent of the remedy provided by law for the enforcement of the judgment.

Brownville v. Loague, 129 U S., 423.

Louisiana v. Mayor, 109 U. S., 285.

Jeffreys v. Lawrence, 42 Iowa, 498.

Though, when authority is granted to a county to contract extraordinary debt by the issue of negotiable securities, the power to levy tax sufficient to meet, at maturity, the obligation to be incurred, maybe implied; yet, when the law which confers the authority, or some general law in force at the time, clearly and manifestly shows a contrary legislative intention, no such implication can arise or be inferred.

Ralls Co. v. United States, 105 Mo., 733.

This is the settled doctrine of this court. In this case, the special law authorizing the issue confined the tax to one twentieth of one per cent. The general law in force at the time limited the tax to one-half of one per cent. for the payment of county expenses. It is the manifest and expressed intention of the legislature that no other tax should be levied for the discharge of these bonds.

The only other law existing in the state at the time allowing the issue of such securities and taxation to pay them, was the 17th sectton of 63d chapter of the General Statutes of 1865. But this requireu the assent of the qualified voters at an election held for that purpose. But it is a conceded and admitted fact on this record that no such election was ever held (p. 14).

Such election was a *sine qua non* for the issue of bonds under the said section, and if issued under said section without said assent, they are void, and the judgment avails nothing, because there was not only a lack of authority to issue them, but a direct inhibition of the Constitution against such action.

Constitution of 1865, sec. 14, article X, page 43, General Statutes of 1865.

Norton v. *Brownsville*, 129 U. S., 479.

Brownsville v. Loague, *supra*.

So that section 17 of the General Railroad Law must be excluded, and there only remains the charter of the railroad company and the General Revenue law, and they expressly limit the taxation, and the record shows that the respondents have exhausted their power under said limitations, so there can be no taxation under these laws.

XXII.

But the question of the power to levy more than the above mentioned taxes has been settled by the adjudications of the Supreme Court of the state, and against the Relator. To pay the bonds issued under the 13th section of the charter of the M. & M. R. R. Co., Macon county court has no power to levy in one year a tax of more than one-twentieth of one per cent. upon the assessed valuation of the taxable property in the county.

State ex rel v. Shortridge, 56 Mo., 126.

This Court will follow the State Court in the construction of the state statute.

"The decisions of the Supreme Court of a state as to the validity of tax laws under the constitution will be followed by Federal Courts.

Taylor & Secor, (*State R. R. Tax Cases*), 92 U. S., (2 Otto) 575.

Amuskeag National Bank v. Ottawa, 105 U. S., (15 Otto) 667.

Bacon v. Northwestern, Etc., Ins. Co., 131, U. S., 258.

If the county has no power, either by express grant or by implication to raise the money by taxation to pay the bonds, the holder cannot require it.

This is said in passing upon the power of the county court to levy taxes to pay the bonds issued by Macon county under this identical act, of the same date as Relator's bonds.

United States v. Macon County Court, 99 U. S. (9 Otto) 582.

The court says: "The difficulty lies in the want of original power. * * * Every purchaser of municipal bonds is chargeable with the notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. * * * We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers."

"In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied, collected and applied. No complaint has been made as to the levy of one-half of one per cent. for general purposes. What is wanted is a levy beyond these amounts, and that, we think, under existing laws, we have no power to order."

"One who takes county bonds issued, under a statute which limits the rate of taxation that may be imposed for their payment to one-twentieth of one per cent., is chargeable with the knowledge of the limitation. It enters into and forms a part of the contract between him and the county. * *

* Neither the fact that they have been reduced to a judgment, nor the fact that the specific fund provided is inadequate, can change this rule."

State ex rel v. Macon County Court, 68 Mo., 29-35.

Cooley's Cons. Limitations, (3d. Ed,) No. 285.

State ex rel Hudson v. Trammel, Mo., 11 Southwestern Reporter, 747.

Same Case on Returning, 17 Southwestern Reporter, 502.

U. S ex rel Davis v. Knox County Court, in Appendix B.

XXIII.

First. The case of the *United States v. the County of Clark*, 96 U. S., 211, relied on by Relator, isn't in point. It decides a very different question from the one at issue in this case. It merely decides that the bonds are simply to be held as debts of the county, and that any balance remaining after the application of the special tax of one-twentieth of one per cent. is exhausted, can be paid out of funds raised for general county expenses. But there is no implication in that case that additional taxes under the 17th section of the General Revenue law, nor any other general or special tax than these under the charter and the General Revenue Law, to-wit: One-twentieth of one per cent. and one-half of one per cent , can be levied to discharge said bonds, or judgment obtained thereon. All that the case in fact decides, and all for which it is authority is that

the Relator was entitled to a warrant on the general funds arising from the levy of fifty cents on the one hundred dollars' valuation.

(It may be suggested with the profoundest respect for the learned opinion in that case, that it has never met the concurrence of the bench and the bar of Missouri, and even this court hasn't been a unit upon it. It is the utmost verge to which this court or any court could have been induced to go.)

See *County Court of Macon County v. Huidekeeper*, No. 858, in the note following the case of the United States ex rel Macon County, 99 U. S. 592.

Second. The case of the *United States v Scotland County*, 32 Fed. Rep., 714, also much relied upon by Relator, isn't in point in this cause. In that case the subscription was under the 17th section of the General Railroad Law. The State Supreme court in the Shortridge case, *supra*, held that the General Railroad Law doesn't apply to these bonds. This rule is approved and followed by this court in *United States v. Macon Counry Court*, 99 U. S. 582. The court says: "Our attentiou has been directed to the General Railroad Law in force when the Missouri & Mississippi R. R. Co. was incorporated, and when the bonds in question were issued, and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscriptions authorized by that Act, which require the assent of two-thirds of the qualified voters of the county."

Third. The case of *Ralls County v. the United States*, 105 U. S. 733, cannot sustain Relator's contention, for it is there held that the bonds issued under the charter of the St.

Louis & Keokuk R. R. Co., which gave the county power to subscribe stock and issue bonds, and to "take the proper steps to protect the interest and *credit* of the county." Under this the court simply holds that they have the full authority to tax to such an extent as may be necessary to pay the bonds. That is not this case. Here there is an expressed limitation on the power to tax. But this Ralls county case is good authority, as we maintain, that where the limitation exists under the statute authorizing the debt, then the holder of the debt is bound by the limitation.

See opinion of Judge Thayer on page 18 of printed record.

XXIV.

But it would appear from relator's brief that he abandons not only the 17th section of the General Railroad Law, but also the 9th section, page 441 and section 165, page 1193, of Wagner's Statues, and bases his claim on the fact that he has a judgment.

First. Though this is true, it can by no means follow that he is entitled to a tax to pay his judgment, unless he shows some law to that effect—some statute authorizing a levy to pay his judgment There is no such Statute in the state. Relator cites none. County Courts cannot levy taxes without statutory authority, as shown above.

Second. Though relator have an unpaid judgment, yet if the County Court, as the record in this case shows, has exhausted its power to levy taxes, then relator isn't entitled to a tax, and these respondents will not be compelled to levy one. His remedy must be somewhere else. He can apply to the legislative authority to provide a remedy by increasing the power of the County Court to tax. He can wait till the ordinary levies provided for by the statutes amount to such a sum as will

pay his debt, or he can pursue the course of the relator in the case of the *United States v. Clark County*, 96 U. S., 211, and get a warrant for his judgment, register it and take his turn, and get his *pro rata* share as creditors of other insolvent debtors are compelled to do.

Third. If everything is excluded out of the record as to this Relator's judgment being on the bonds, then Relator's judgment, simply being a debt of the county like any other debt, he would be entitled to no remedy thereon more than any other judgment creditor of the county, and he and all other judgment creditors could look *only* to the levy of one-half of one per cent.; and he must show that the county has not levied that sum which he wholly fails to do. The Respondents show that they have levied all they are allowed to levy, and that is a sufficient return.

State v City of Davenport, 12 Ia., 335.

High on Ex. Legal Remedies, sec 369, p. 261.

State ex rel v. The Town of Pacific, 61 Mo., 155.

Fourth. The record shows that Relator's bonds were issued under the charter of the railroad company, and under that alone, and his remedies are confined to those given him by the charter and by the General Revenue law in force at that time.

Fifth. But any relief granted to Relator on the simple theory that he has a judgment would be a departure from his writ, and such order or judgment would have no pleadings upon which to stand.

XXV.

The contention of relator that the last clause of section 11, art. X,, of the Constitution of 1875, authorizes a tax to pay his judgment seems to be wholly without merit. That clause

is as as follows: "Said restrictions as to rates, shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued iu renewal of such indebtedness." This clearly isn't a grant of power to the legislature. The preceding limitations in the section have restrained and restricted the power naturally belonging to the legislature, and this clause makes said restrictions apply to every specie of taxation, and merely exempts from these restrictions such obligations as were then existing wherein the reduction in the power to tax would have infringed upon the Constitution of the United States by impairing the obligation of contracts. That the convention well knew they could not do and were too wise to attempt, and expressly say that the restrictions so imposed shall not be construed so as to interfere with or in any wise impair the obligation of existing contracts, making it perfectly plain what they mean. It is simply an exception out of the limitations and not a grant of additional power. It was as far from the intention of the convention to change the contract in favor of the creditor and against the county, as it was to limit it against the creditor and in favor of the county. Either proceeding would have been alike unjust, and there is no such intention visible or inferable from the language.

If such clause could be construed as a grant of power, it is a grant to the legislature, and not to the *Relator* or any other creditor of the county. The mere fact that the legislature has the power to tax, is not sufficient. It must not only have the power, but must exercise it by enacting a law, before the County Court can make a levy.

This clause, if construed as grant of power, cannot be claimed to confer authority upon the County Court to tax.

The grant would be to the legislature. The Relator wholly fails to show that the legislature has ever undertaken to exercise such power. Without such legisiation giving direct power to the County Court, it is powerless.

Sutherland on Statutory Construction, Sec. 365, p. 465, and cases cited.

City of St. Louis v. Laughlin, 49 Mo., 559.

Matter of Second Avenue M. E. Church, 66 N. Y., 395.

It would be a strained and most unnatural construction to hold said clause as a grant of power to levy taxes *ad libitum* to pay back indebtedness as contended. It would force the larguage, to say nothing of the spirit and intent of the whole instrument.

XXVI.

The relator in his brief finally cites the statute of Missouri authorizing counties and municipalities to compromise their bonded indebtedness. We think that a close perusal of that statute will clearly show that it has no part in this controversy. The County Court, under the statute, can submit the question to the legal voters as to whether they will compromise a given debt at a given rate, and on given conditions; and upon an election held for that purpose, if the majority of the voters so direct, then the County Court simply has authority to compromise. This proceeding to give the County Court authority must be instituted the presentation of a petition signed by one hundred tax-payers of the county. Now, in all this record there is not an intimation, nor a hint, that such petition was ever presented, nor that the County Court ever ordered an election, nor that an election was ever held, nor that a majority of the qualified voters were in favor of the proposition, nor any other necessery allegation to show that there ever

was any attempt on the part of the bondholders or anybody else to compromise this indebtedness.

Besides, the statutes nowhere undertake to abrogate the contract between the county and the bondholder. It simply gives the county the power to make a new contract with the bondholder, if it and the bondholder can agree to do so, and till such agreement takes place, the old contract is in full force and vigor. And this record shows that this old contract still remains between the Relator and the county. And these Respondents' claim is that Relator shall live by his contract. They are not here to repudiate one condition of that contract. They are simply here to stand by it. And they ask this Court not to allow Relator to transgress its stipulations.

Ben Eli Guthrie
Atty for Defts in Error.

APPENDIX A.

COPY OF ORIGINAL PETITION.

UNITED STATES OF AMERICA,
State of Missouri.

In the Circuit Court of the United States, Eastern Division of the Western District of Missouri.

Joseph E. Jones, plaintiff,

vs.

Macon County, defendant.

PETITION.

Joseph E. Jones, plaintiff, who is a citizen of the State of Pennsylvania, complains of Macon county, which is a municipal corporation, created and existing under the laws of the state of Missouri, and a citizen of the Eastern Division of the Western District of Missouri, that heretofore, to-wit: on the 2d day of May, 1870, the defendant made, executed, issued and delivered certain bonds by the then presiding justice of the county court of Macon county, under the order of said court, signing his name thereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court. Done at the city of Macon, the day last aforesaid, which said bonds are alike in all respects, except the designated numbers, which are as follows: 8, 11, 13, 14, 15, 19 and 142, a copy of which said bonds is hereto appended, filed and made a part of this petition, and marked exhibit "A," and by each of said bonds the defendant acknowledged itself indebted to the Missouri and Mississippi Railroad company, or bearer, in the sum of one thousand dollars, which sum the defendant promised to pay at the National Bank of Commerce, in the city of New York, on the 2d day of May, 1890, with interest at the rate of eight per cent. per annum, which interest should be payable semi-annually, on

presentation of the coupons thereto annexed at the National Bank of Commerce, in the city of New York, which bonds were issued under, and pursuant to orders of the county court, for the subscription of the stock of the Missouri and Mississippi R. R. company, as authorized by an act of the General assembly of the State or Missouri, entitled, "An Act to Incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, as by each of said bonds is fully recited.

And plaintiff states he is the owner, holder and bearer, for value paid before maturity, of the following coupons herewith filed, which are past due and unpaid, detached from said bonds, to-wit:

One	coupon	No.	9	from bond	No.	8,	due	Nov.	2d,	1874, for $40.00
	"		10	"		"	"	May	"	1875, " "
	"		11	"		"	"	Nov.	"	1875, " "
	"		12	"		"	"	May	"	1876, " "
	"		13	"		"	"	Nov.	"	1876, " "
	"		14	"		"	"	May	"	1877, " "
	"		15	"		"	"	Nov.	"	1877, " "
	"		16	"		"	"	May	"	1878, " "
	"		17	"		"	"	Nov.	"	1878, " "
	"		18	"		"	"	May	"	1879, " "
	"		19	"		"	"	Nov.	"	1879, " "
	"		20	"		"	"	May	"	1880, " "
	"		21	"		"	"	Nov.	"	1880, " "
	"		22	"		"	"	May	"	1881, " "
	"		23	"		"	"	Nov.	"	1881, " "
	"		24	"		"	"	May	"	1882, " "
	"		25	"		"	"	Nov.	"	1882, " "
	"		26	"		"	"	May	"	1883, " "
	"		27	"		"	"	Nov.	"	1883, " "
	"		28	"		"	"	May	"	1884, " "
	"		9	"		11	"	Nov.	"	1874, " "
	"		10	"		"	"	May	"	1875, " "
	"		11	"		"	"	Nov.	"	1875, " "
	"		12	"		"	"	May	"	1876, " "
	"		13	"		"	"	Nov.	"	1876, " "
	"		14	"		"	"	May	"	1877, " "
	"		15	"		"	"	Nov.	"	1877, " "
	"		16	"		"	"	May	"	1878, " "

"	17	"	"	"	Nov.	"	1878,	"	"
"	18	"	"	"	May	"	1879,	"	"
"	19	"	"	"	Nov.	"	1879,	"	"
"	20	"	"	"	May	"	1880,	"	"
"	21	"	"	"	Nov.	"	1880,	"	"
"	22	"	"	"	May	"	1881,	"	"
"	23	"	"	"	Nov.	"	1881,	"	"
"	24	"	"	"	May	"	1882,	"	"
"	25	"	"	"	Nov.	"	1882,	"	"
"	26	"	"	"	May	"	1883,	"	"
"	27	"	"	"	Nov.	"	1883,	"	"
"	28	"	"	"	May	"	1884,	"	"
"	9	"	13	"	Nov.	"	1874,	"	"
"	10	"	"	"	May	"	1875,	"	"
"	11	"	"	"	Nov.	"	1875,	"	"
"	12	"	"	"	May	"	1876,	"	"
"	13	"	"	"	Nov.	"	1876,	"	"
"	14	"	"	"	May	"	1877,	"	"
"	15	"	"	"	Nov.	"	1877,	"	"
"	16	"	"	"	May	"	1878,	"	"
"	17	"	"	"	Nov.	"	1878,	"	"
"	18	"	"	"	May	"	1879,	"	"
"	19	"	"	"	Nov.	"	1879,	"	"
"	20	"	"	"	May	"	1880,	"	"
"	21	"	"	"	Nov.	"	1880,	"	"
"	22	"	"	"	May	"	1881,	"	"
"	23	"	"	"	Nov.	"	1881,	"	"
"	24	"	"	"	May	"	1882,	"	"
"	25	"	"	"	Nov.	"	1882,	"	"
"	26	"	"	"	May	"	1883,	"	"
"	27	"	"	"	Nov.	"	1883,	"	"
"	28	"	"	"	May	"	1884,	"	"
"	9	"	14	"	Nov.	"	1874,	"	"
"	10	"	"	"	May	"	1875,	"	"
"	11	"	"	"	Nov.	"	1875,	"	"
"	12	"	"	"	May	"	1876,	"	"
"	13	"	"	"	Nov.	"	1876,	"	"
"	14	"	"	"	May	"	1877,	"	"
"	15	"	"	"	Nov.	"	1877,	"	"
"	16	"	"	"	May	"	1878,	"	"
"	17	"	"	"	Nov.	"	1878,	"	"
"	18	"	"	"	May	"	1879,	"	"

"	19	"	"	"	Nov.	"	1879,	"	"
"	20	"	"	"	May	"	1880,	"	"
"	21	"	"	"	Nov.	"	1880,	"	"
"	22	"	"	"	May	"	1881,	"	"
"	23	"	"	"	Nov.	"	1881,	"	"
"	24	"	"	"	May	"	1882,	"	"
"	25	"	"	"	Nov.	"	1882,	"	"
"	26	"	"	"	May	"	1883,	"	"
"	27	"	"	"	Nov.	"	1883,	"	"
"	28	"	"	"	May	"	1884,	"	"
"	9	"	15	"	Nov,	"	1874,	"	"
"	10	"	"	"	May	"	1875,	"	"
"	11	"	"	"	Nov.	"	1875,	"	"
"	12	"	"	"	May	"	1876,	"	"
"	13	"	"	"	Nov.	"	1876,	"	"
"	14	"	"	"	May	"	1877,	"	"
"	15	"	14	"	Nov.	"	1877,	"	"
"	16	"	"	"	May	"	1878,	"	"
"	17	"	"	"	Nov.	"	1878,	"	"
"	18	"	"	"	May	"	1879,	"	"
"	19	"	"	"	Nov.	"	1879,	"	"
"	20	"	"	"	May	"	1880,	"	"
"	21	"	"	"	Nov.	"	1880,	"	"
"	22	"	"	"	May	"	1881,	"	"
"	23	"	"	"	Nov,	"	1881,	"	"
"	24	"	"	"	May	"	1882,	"	"
"	25	"	"	"	Nov.	"	1882,	"	"
"	26	"	"	"	May	"	1883,	"	"
"	27	"	"	"	Nov.	"	1883,	"	"
"	28	"	"	"	May	"	1884,	"	"
"	9	"	16	"	Nov.	"	1874,	"	"
"	10	"	"	"	May	"	1875,	"	"
"	11	"	"	"	Nov.	"	1875,	"	"
"	12	"	"	"	May	"	1876,	"	"
"	13	"	"	"	Nov.	"	1876,	"	"
"	14	"	"	"	May	"	1877,	"	"
"	15	"	"	"	Nov.	"	1877,	"	"
"	16	"	"	"	May	"	1878,	"	"
"	17	"	"	"	Nov.	"	1878,	"	"
"	18	"	"	"	May	"	1879,	"	"
"	19	"	"	"	Nov.	"	1879,	"	"
"	20	"	"	"	May	"	1880,	"	"

"	21	"	"	"	Nov.	"	1880,	"	"
"	22	"	"	"	May	"	1881,	"	"
"	23	"	"	"	Nov.	"	1881,	"	"
"	24	"	"	"	May	"	1882,	"	"
"	25	"	"	"	Nov.	"	1882,	"	"
"	26	"	"	"	May	"	1883,	"	"
"	27	"	"	"	Nov.	"	1883,	"	"
"	28	"	"	"	May	"	1884,	"	"
"	10	"	142	"	May	"	1875,	"	"
"	11	"	"	"	Nov.	"	1875,	"	"
"	12	"	"	"	May	"	1876,	"	"
"	13	"	"	"	Nov	"	1876,	"	"
"	14	"	"	"	May	"	1877,	"	"
"	15	"	"	"	Nov.	"	1877,	"	"
"	16	"	"	"	May	"	1878,	"	"
"	17	"	"	"	Nov.	"	1878,	"	"
"	18	"	"	"	May	"	1879,	"	"
"	19	"	"	"	Nov.	"	1879,	"	"
"	20	"	"	"	May	"	1880,	"	"
"	21	"	"	"	Nov.	"	1880,	"	"
"	22	"	"	"	May	"	1881,	"	"
"	23	"	"	"	Nov.	"	1881,	"	"
"	24	"	"	"	May	"	1882,	"	"
"	25	"	"	"	Nov.	"	1882,	"	"
"	26	"	"	"	May	"	1883,	"	"
"	27	"	"	"	Nov.	"	1883,	"	"
"	28	"	"	"	May	"	1884,	"	"

Being one hundred and forty-two coupons in all, amounting in the aggregate to the sum of five thousand, six hundred and eighty dol ars. Wherefore plaintiff asks judgment against the defendant for the aggregate amount of said coupons, to-wit: Five thousand, six hundred and eighty dollars, with interest at the rate of seven per cent. per annum, and for costs.

Plaintiff for another and further cause of action alleges that heretofore, to-wit: On the first day of February, 1869, defendant executed, issued and delivered divers bonds, with coupons attached, one of which bonds is in words and figures following, the rest being identical, except as to the number, viz:

UNITED STATES OF AMERICA,
COUNTY OF MACON, STATE OF MISSOURI.

MACON COUNTY RAILROAD BOND NO. 15. FIVE YEARS.

$1,000.

Know all men by these presents, that the county of Macon, state of Missouri, acknowledged itself indebted to the Missouri & Mississippi Railroad Company, (organized by an Act of the General Assembly of the State of Missouri,) or bearer, in the sum of one thousand dollars, which sum the said county promises to pay at the banking house of Bartholow, Lewis & Co., in the city of St. Louis, on the first day of February, 1879, with interest at seven per cent. per annum, which interest shall be payable annually on presentation of the coupons hereto annexed, at the said banking house of Bartholow, Lewis & Co. This bond being issued under and pursuant to orders of the county court of Macon county for subscription to the stock of the Missouri & Mississippi Railroad company as authorized by an Act of the General Assembly of the State of Missouri, entitled, "An Act to Incorporate the Missouri & Mississippi Railroad Company," approved February 20th, 1865.

In testimony whereof the said county of Macon has executed this bond by the presiding justice of the county court of Macon county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court. This done at the city of Macon, county and state aforesaid, this first day of February, 1869. A. C. ATTERBERRY,

Presiding Justice of the County Court of Macon County.

JOHN FARRER, Clerk.

{ SEAL. }

Plaintiff states that said bonds were executed by defendant by the presiding justice of the county court thereof, under the order of said court, signing the same and by the clerk of said court, under the order thereof, attesting the same and affixing

thereto the seal thereof, and were issued pursuant to the act of the General Assembly of the State of Missouri, incorporating the Missouri & Mississippi Railroad Company, approved February 20th, 1865.

Plaintiff states that among the coupons of interest attached to said bonds was one in words and figures following; the rest being identical, except as to the numbers, viz:

$70 RAILROAD BOND. $70

MACON CITY, MO., Feb. 1st, 1869.

The County of Macon, State of Missouri, will pay to the bearer, on February 1st, 1879, at the banking house of Bartholow, Lewis & Co., in the city of St. Louis, Mo., seventy dollars, being one year's interest on bond No. 16, for $1,000.

JOHN FARRER, COUNTY CLERK.

And plaintiff states that he is the owner, holder and bearer, for value paid before maturity, of the following coupons herewith filed, which are past due and unpaid, detached from the said bonds, to-wit

One coupon, No	6, from	bond No.	15, due	Feb.	1, 1875,	for $70 00
do	7,	do	do	do	1876,	do
do	8,	do	do	do	1877,	do
do	9,	do	do	do	1878,	do
do	10,	do	do	do	1879,	do
do	6,	do	16,	do	1875,	do
do	7,	do	do	do	1876,	do
do	8,	do	do	do	1877,	do
do	9,	do	do	do	1878,	do
do	10,	do	do	do	1879,	do
do	6,	do	19,	do	1875,	do
do	7,	do	do	do	1876,	do
do	8,	do	do	do	1877,	do
do	9,	do	do	do	1878,	do
do	10,	do	do	do	1879,	do

Being fifteen coupons in all, amounting in the aggregate to one thousand and fifty dollars.

Wherefore plaintiff asks judgment against defendant for the aggregate amount of said coupons, to-wit: One thousand

and fifty dollars, with interest at the rate of six per cont. per annum, and for costs.

HAMILTON & FISHER,
Attorneys for Plaintiff.

[Endorsed.]
Filed October 29th, 1884.
H. C. GEISBERG, Clerk.

APPENDIX B.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

United States ex rel Samuel C. Davis vs. Knox County et als. Thos. K. Skinner, Attorney for Relator; Jas. Carr, Attorney for Respondents.

OPINION OF THE COURT.

Thayer, Judge. June 29th, 1891.

The questions to be determined arise on a motion to quash the return to an alternative writ of mandamus, commanding the levy of certain taxes to pay a judgment recovered on bonds issued in pursuance of power conferred by the charter of the Missouri and Mississippi Railroad Company.

Vide Mo. Sess. Acts 1864, regular session, page 86.

If I understand the points made by counsel for Relator, they are substantially as follows:

1st. That the holders of bonds issued under the charter in question, have the right, after exhausting a special tax of one-twentieth of one per cent., to resort to the *general funds* of the county, created by a levy of not less than one-half of one percentum annually, that being the rate of taxation for county purposes in force when Relator's bonds were issued, Vide Sess. Laws of Mo., 1868. 1868 sec. 2, Act, Jan. 30, 1868, page 142, and Acts of 1869, sec. 1, page 81.

To this I answer *granted* under the decision in the United States v. Clark County, 96 U. S., 211, re-affirmed in U. S. v. County of Macon, 99 U. S., 582, and Knox County v. U. S., 109 U. S., 229.

2d. The second point is that the tax of one-half of the one percentum for county purposes, authorized by section 1 of the Act of March 19, '79, Sess. Laws of Mo., 1879, page 193, now Sec 7662, R. S. of 1889—*cannot be regarded as a continuation of the tax of one-half of one per cent. for general county purposes, authorized by previous laws, but is a new tax*, and that counties who have issued bonds under the Missouri and Mississippi charter, for the payment thereof, may be compelled to levy a tax to the extent of one-half of one per cent., in addition to the tax authorized by the act of 1879.

This point must be overruled. It is contrary to the interpretation of the act of 1879 that has been adopted and acted upon for the past ten years. Section 1 of the Act of 1879 was obviously intended as a substitute for the laws then in force granting authority to the several counties to levy taxes for general county purposes, and it was passed to give effect to sec 11, Art. 10 of the Constitution of 1875. The Federal courts have heretofore acted on the assumption that counties might be compelled by mandamus to exercise the taxing power conferred by the act of '79, for the purpose of raising a fund to pay bonds issued under the Missouri and Mississippi charter. They so acted in the case of Macon County v. Huidekoper, 134 U. S. 332, and it never seems to have occurred to any one heretofore that the taxing power conferred by thas act was not available for the purpose of paying county bonds.

3d. It is next contended that if the aet in question was intended as a substitute for previous laws, authorizing taxation for county purposes, then it impairs the Relator's contract, because certain county expenses for roads and bridges are now payable out of the general fund and tend to deplete it, which were not payable out of said fund when the Missouri and Mississippi charter was granted.

This contention must be overruled. Conceding for the purpose of this decision, but without deciding, that the state could not as against bondholders reduce the rate of taxation for general county purposes that was established by law on Febru-

ary 20, 1865, or on May 13, 1867, when the subscription under that act was made—yet it does not follow that the state was thereafter powerless to charge against the general revenues of the county any other legitimate county expenses than such as were in 1865 or 1867 chargeable against the general fund.

As well might it be said that the state contracted with the bondholder that the county expenses should at no time in the future exceed what they then were. The fact is that the state authorized a special tax of one-twentieth of one per cent. for the exclusive benefit of the bondholder. It said to him in effect, "if the special tax does not pay your bonds you must take your chance of obtaining the residue out of whatever moneys the county may from time to time be allowed to raise by taxation for general county pnrposes." The bondholder must be presumed to have taken his bonds with knowledge of the fact that the expenses and revenues of the county would vary from year to year, and that new expenses might be incurred or created. There was no guarantee on the part of the state that the county expenses would remain a fixed or unvarying quantity.

The most that can consistently be claimed is, that the state cannot reduce the rate of taxation for general county purposes which was in force when the Missouri and Mississippi charter was granted, and that it has not done or attempted to do. In point of fact the authorized rate of taxation for county purposes is now greater than it was on February 20, 1865, and as much it was on May 13, 1867.

Vide Art. 1, Sec. 4, Act of February 4, '64, and Art. 4, Sec. 1, same account. Sess. Laws of Mo., 1863, adjourned session, pages 66 and 84.

The views that I have expressed on the point now under consideration are even more favorable to the Relator than would seem to be warranted by some expressions found in the case of U. S. v. Macon County, 99 U. S., 589. Thus in the case cited the following language was used:

"* * * while the debt was authorized, the power of taxation for its payment was limited by the act itself, *and the General Statutes in force at the time*, to the special tax designated in the act, and such other taxes applicable to this subject, *as there were or might hereafter by general or spedial acts be permitted*."

The italics are my own. From what was thus said it may fairly be claimed that, in the opinion of the supreme court, the rate of taxation for county purposes in force on February 20th, 1865, may be diminished at will by the legislature, without impairing the contract of the bondholders. But it is unnecessary to go to that extent, as the state has not reduced the rate of taxation for general county purposes since 1865.

4th. The point is also made that both the constitution of '76 and the act of '79 provide that the limitation therein imposed upon taxation for county purposes, shall not apply to taxes levied to pay valid bonded indebtedness, and from this it is argued that the taxation authorized by the act of '79 had no reference to taxes levied to pay county bonds.

The point is without merit for the following reason:

It is well known that when the constitution of '75 was adopted, many, or at least some counties, had issued bonds under laws which permitted taxation to any amount for their payment. Other counties, like the respondent, had issued bonds under laws permitting the levy of a limited tax for their payment. The proviso obviously has reference to counties so situated. It permits them to levy one-half of one per cent. in addition to whatever special tax was authorized to meet bonded indebtedness by laws enacted prior to the Constitution of '75. But it does not permit counties which have issued bonds under the Missouri & Mississippi charter to levy taxes adlibitum.

Such counties may levy a special tax of one-twentieth of one per cent.; when that is exhausted, recourse must be had by the bondholders to the "general fund," and the tax to cre-

ate such general fund is limited both by the constitution and Statute to one-half of one per cent. annually.

The counties have no power to overstep that limit and, as a matter of course no court, state or federal, can compel them to do so.

It follows from the views heretofore expressed that the respondent's return must be adjudged sufficient and the motion to quash be overruled.

The return shows that Knox county has levied a special tax of one-twentieth of one per cent. and in addition a tax of one-half of one per cent. for general purposes. More than that it cannot be compelled to assess.

APR 2 1892
JAMES H. McKENNEY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 257.

THE UNITED STATES EX REL. JOSEPH E. JONES,
PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF MACON COUNTY AND THE JUSTICES THEREOF, DEFENDANTS IN ERROR.

Supplemental Brief for Plaintiff in Error.

JOSEPH SHIPPEN,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 257.

THE UNITED STATES EX REL. JOSEPH E. JONES,
PLAINTIFF IN ERROR,

vs.

THE COUNTY COURT OF MACON COUNTY AND THE JUSTICES THEREOF, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Supplemental Brief for Plaintiff.

Plaintiff's assignment of error challenges the legal correctness of the adverse judgment (printed Record, p. 19) refusing to grant a peremptory writ of *mandamus* ordering a tax to pay his judgment against Macon county, recovered on bonds and coupons issued under authority of the charter of the Missouri and Mississippi Railroad Company.

"SEC. 13. It shall be lawful for the corporate authorities "of any city or town, the county court of any county desir- "ing so to do, to subscribe to the capital stock of said com-

" pany, and may issue bonds therefor and levy a tax to pay " the same, not to exceed one-twentieth of one per cent. upon " the assessed value of taxable property for each year."

The power to *issue* bonds under said charter was early and emphatically settled by this court in—

Macon County *vs.* Shores, 97 U. S., 272.

Per Swayne, J., it was said :

" The 13th section of the charter authorized the county " court to subscribe and issue bonds. No limit is prescribed, " either as to the time or amount of the subscription. * * * " Some things lie too deep in the common sense and com- " mon honesty of mankind to require either argument or " authority to support them, and this, I think, is one of them."

The power to *pay* the bonds when issued and sold and reduced to final judgment is the subject of controversy.

The pertinent facts disclosed by the record and lying within a small compass are as follows:

Macon county, under the 13th section of said charter, made two stock subscriptions—one April 2, 1867, under which a part of plaintiff's bonds were issued February 1, 1869, and another May 2, 1870, under which the rest of plaintiff's bonds were issued. Upon coupons therefrom plaintiff recovered a general judgment November 25, 1884, for $8,974.39; and November 11, 1887, instituted this proceeding to compel the levy of a tax upon the property of the county to pay said judgment. The special tax of $\frac{1}{20}$ of 1 per cent. authorized by the charter, and the general tax of $\frac{1}{2}$ of 1 per cent., authorized by the general statutes " for county purposes," had already been levied. The taxable wealth of the county was less than six million dollars.

I.

In 1887 *the respondent had the power under the General Statutes of Missouri to levy such additional tax prayed for and refused.*

The existence of this power is purely a question of law presented by the record for determination from the General Statutes of Missouri, of which the Court takes judicial cognizance. The legal authority alleged to exist is not to be ascertained by pleadings or findings of fact *pro* or *con.*; its existence depends upon legislative enactments by which it is expressly or impliedly created.

Citation is made to the following:

MISSOURI GENERAL STATUTES

relating to county revenues as pertinent to the question in hand.

A.—*Acts* 1868, p. 142, section 2:

"The several county courts are empowered to levy such "sums as may be annually necessary to defray the expenses "of their respective counties by a tax upon all property and "licenses made taxable by law for State purposes, except "what is herein excepted by this act; but the county tax "shall in no case exceed the State revenue tax on the same "subjects of taxation more than one hundred per centum "for the same time."

B.—*Acts* 1869, p. 81, section 1:

"There shall be annually levied, assessed, and collected "on the assessed value of all the real estate and other prop- "erty subject by law to taxation in this State one-fourth of "one per centum for State revenue and one-fourth of one per "centum for the payment of all State indebtedness."

Thus the limit of county tax was set at one-half of one per cent., and this was subsequently perpetuated by direct statute, viz:

C.—*Acts* 1872, p. 116, section 166; *Wagner's Statutes*, p. 1193:

"The several county courts are empowered to levy such "sums as may be annually necessary to defray the expenses "of their respective counties by a tax upon all property and "licenses made taxable by law for State purposes, except "what is herein excepted by this act; but the county tax "shall in no case exceed one-half of one per cent. on all "taxable property, and on all licenses made taxable by "law the county tax shall not exceed the State revenue tax "more than one hundred per centum for the same time, "the State interest tax not to be construed to be State reve-"nue tax."

D.—*General Statutes* 1866, p. 233, sections 8 and 12, grant county courts power to levy and collect ("in the same manner that county taxes are levied and collected") what is necessary for *poor-houses and poor.*

E.—*General Statutes* 1866, p. 298, section 13, grants county courts authority to levy needed taxes for bridges in some cases.

F.—*Acts* 1868, p. 154, section 27:

"For the purpose of opening, repairing, and improving "roads, and in order to raise the necessary funds to pay the "expenses of any or all of said opening, repairing, or im-"provements, the county courts of the various counties shall "levy a special tax, not exceeding four mills on the dollar "of the taxable property of the county and all property "taxable by law, which shall be known as the 'road tax,' "said levy to be made at the same time and in the same "manner as the county revenue is levied."

G.—*Constitution of* 1875 (Rev. St. 1879, p. 80; Rev. St. 1889, p. 97), article X, section 11:

"For county purposes the annual rate on property in "counties having six million dollars or less shall not in the "aggregate exceed fifty cents on the hundred dollars valu- "ation; in counties having six millions and under ten "million dollars said rate shall not exceed forty cents on "the hundred dollars valuation; in counties having ten "millions and under thirty million dollars said rate shall "not exceed fifty cents on the hundred dollars valuation, "and in counties having thirty millions or more said rate "shall not exceed thirty-five cents on the hundred dollars "valuation; * * * said restrictions as to rates shall "apply to taxes of every kind and description, whether gen- "eral or special, *except taxes to pay valid indebtedness now ex- "isting* or bonds which may be issued in renewal of such "indebtedness."

H.—*Acts* 1879, p. 185 (March 8, 1879), "An act concerning the assessment, levy, and collection of taxes and the disbursement thereof," section 1 (Revised Statutes 1879, sec. 6798).

Revised Statutes 1889, section 7653:

"*Taxes, how assessed, levied, and collected.*—The following- "named taxes shall hereafter be assessed, levied, and "collected in the several counties in this State, and only "in the manner and not to exceed the rates prescribed "by the constitution and laws of this State, viz., the State "tax and the tax necessary to pay the funded or bonded "debt of the State, *the tax for current county expenditures* and "for schools."

I.—*Acts* 1879, p. 191 (March 19, 1879), section 1 (Rev. St. 1879, sec. 6807), Rev. St. 1889, sec. 7662:

"*For county purposes*, the annual tax on property, *not in- "cluding taxes for the payment of valid bonded indebtedness* "or renewal bonds issued in lieu thereof, shall not in "any county in this State exceed the rates herein specified: "In counties having six million dollars or less said rate "shall not exceed fifty cents on the hundred dollars valua-

"tion; in counties having six million dollars and less than "ten million, said rate shall not exceed forty cents on the "hundred dollars valuation." * * *

J.—*Acts of* 1879, p. 191, "An act for the better protection of the county revenue funds of the State," section 1 (Rev. St. 1879, section 6818), Rev. St. 1889, section 7663:

"*County court to appropriate, apportion, and subdivide revenue.*—The county courts of the several counties of this State "are hereby authorized and empowered, at the first regular "term of such court after the taking effect of this chapter, "and at the May term every year thereafter, to appropriate, "apportion and subdivide all the revenues collected and to "be collected, and moneys received and to be received, in "the various counties in the State, *for county purposes*, in the "following order:

"I. A sum sufficient for the payment of all the necessary "expenses that may be incurred for the care of paupers and "insane persons of such county.

"II. A sum sufficient for the payment of all necessary "expenses for the building of bridges and repairing roads, "including the pay of road overseers of such county.

"III. A sum sufficient for the payment of the salary of "all county officers, where the same is by law made payable "out of the ordinary revenues of the county.

"IV. A sum sufficient for the payment of the fees of "grand and petit jurors, judges and clerks of elections, and "fees of witnesses for the grand jury of the county.

"V. A sum sufficient for the payment of the other current expenses of the county, not hereinbefore specially "provided for, which shall be known and designated as the "contingent fund of such county; which last sum shall in "no case exceed one-fifth of the total revenue of such county "purposes for any one year."

"SEC. 2 (R. S., 7664). Order, how made; funds, how "drawn and applied. * * *

"SEC. 3 (R. S., 7665). County revenue to be separated and "subdivided. * * *

"SEC. 4 (R. S., 7666). Warrants, how drawn; demands, "how presented. * * *

A SUMMARY

of above general statutes is given, viz:

A—In 1868 authorized county courts to levy the sums annually necessary to defray expenses, not exceeding twice the State revenue tax.

B—In 1869 fixed State revenue tax at one-fourth of one per cent.

C—In 1872 authorized county courts to levy the sums annually necessary to defray expenses, not exceeding one-half of one per cent.

D—In 1868 authorized county courts to levy taxes necessary for poor-houses and poor.

E—In 1866 authorized county courts to levy taxes for bridges.

F—In 1868 authorized county courts to levy road tax, not exceeding four mills on the dollar.

G—In 1875 constitution limited taxes "for county purpuposes" in counties having less than $6,000,000 wealth to one-half of one per cent., *except* taxes to pay valid indebtedness.

H—In 1879 limited the levy of county taxes to the tax "for current county expenditure," to constitutional limitation, except as therein provided under judicial sanction.

I—In 1879 authorized annual tax "for county purposes" to constitutional limit, viz., one-half of one per cent., in counties under $6,000,000, "*except* taxes for the payment of valid bonded indebtedness."

J—In 1879 required the county courts to apportion and appropriate all revenues collected to—

1. Expenses of paupers and insane.
2. Expenses of bridges and roads and road overseers.
3. Salaries of county officers.
4. Fees of jurors, election officers, and witnesses.
5. Contingent fund for other ordinary current expenses.

From an analysis of the above general statutes the conclusions are irresistible—

(1.) That (1) the poor, (2) the bridges, and (3) the roads are now expressly provided for under the levy "for county expenses;" and thus the statutes D, E, and F are abrogated and the tax of one-half of one per cent. "for county purposes," authorized by the later enactments of 1879, is burdened with providing therefor.

(2.) That the levy of one-half of one per cent. tax claimed and admitted by this record to have been made was made pursuant to the power conferred by the enactments of 1879—H and I—now embraced in the Revised Statutes.

(3.) That the one-half of one per cent. tax so authorized by H and I is expressly made inapplicable to existing bonded indebtedness. Existing provisions therefor were left by the express terms *in statu quo*. Such express exception was reserved in the constitution, I, by the words "*except taxes to pay valid indebtedness now existing*," and in the statute by the words "*not including taxes for the payment of valid bonded indebtedness.*"

(4.) And finally that the power conferred in 1869-'70 by the statutes A and B and reasserted and continued in C to levy a tax of one-half of one per cent. remains unrepealed and subsists as the legal remedy existing for the protection of the plaintiff's bonds, and still subsisting as an unexercised power which this mandamus proceeding should enforce.

To sustain and fortify the legal accuracy of this last point as justifying plaintiff's assignment of error herein the remainder of this brief will be devoted.

I.

The one-half of one per cent. tax which respondent was authorized to levy when plaintiff's bonds were issued in 1869–'70 was applicable to payment of his debt as a general liability of the county.

This proposition is not open to debate or doubt under the express and direct adjudications in the following uniform, consistent series of decisions by this Court:

(1) United States *vs.* County of Clark, 95 U. S., 769 (1878).

(2) United States *vs.* County of Clark, 96 U. S., 211 (1878).

(3) Macon County Court *vs.* Huidekoper, 99 U. S., 592 (1879).

(4) Macon County Court *vs.* Huidekoper, 109 U. S., 229 (1883).

(Four other Knox county cases therewith.)

(9) Macon County Court *vs.* Huidekoper, 134 U. S., 332 (1890).

In above cases, Nos. 1 and 2, Johnson, having recovered judgment against Clark county on M. & M. R. R. coupons, sought collection by two distinct proceedings in *mandamus*.

In No. 1 the alternative writ called on respondent—

"To levy and collect a tax of one-twentieth of one per cent. "for the years 1872, 1873, and 1874 and each of the follow- "ing years and apply a *pro rata* share thereof to the plain- "tiff's judgment, and to levy the residue of said five-mill "tax for the year 1874 and each successive year and collect "said taxes and apply the same yearly on the plaintiff's "judgment until paid."

The return, which was admitted by demurrer, stated that the respondent had levied said tax of one-half of one per

cent. for the year 1874, and that it was collected and paid out for county expenses.

Thereupon the Supreme Court, per Strong, J., says (page 773):

"The circuit court was therefore right in refusing to order "a peremptory *mandamus* to levy and collect the special tax "for the years 1872 and 1873 and in directing it only for "the subsequent years. There was also no error in refusing "to order the writ to enforce the levy and collection of other "taxes. The county court has by law no power to levy, in "addition to the special tax allowed by the charter of the "Missouri and Mississippi Railroad Company, a tax exceed- "ing the rate of one-half of one per cent. of the valuation of "the taxable property, and the return to the alternative "writ avers that for the year 1874 a county tax of one-half "of one per cent. had been fully levied and collected. * * * "We do not assert that the relator is without remedy against "the county, or that his remedy is restricted to a resort to "the proceeds of the special tax."

This decision is important, as manifesting how fully the United States Supreme Court was possessed of the controversy when it rendered on the same day (January 7, 1878) the direct and important decision in the other case, No. 2.

In this case (96 U. S., 211) Johnson applied for a *mandamus* requiring the county court of Clark county to draw a warrant on the county treasurer for the balance of his judgment remaining unpaid, so that he might be enabled on its presentation to have it paid in its order out of the county treasury. Thereby he sought under the Missouri statutes above to establish his right of payment from the general fund arising from the one-half of one per cent. tax.

Attention is asked to the whole of the opinion by Mr. Justice Strong (96 U. S., 214), and especially to the following paragraphs embodying the conclusions:

"The question presented by the record is whether the re- "lator is entitled to payment of his judgment out of the

"general funds of the county, so far as the special tax of "one-twentieth of one per cent. is insufficient to pay it, and "we think that he is thus entitled is plain enough unless "the act which gave the county authority to issue the bonds "directs otherwise. * * * There is no provision in the "act that the proceeds of the special tax alone shall be ap- "plied to the payment of the bonds. None is expressed and "none, we think, can fairly be implied. * * * These "bonds are a debt of the county as fully as is any other lia- "bility. * * * In the absence of any express declaration "that the creditors' right to claim payment shall not reach "beyond the fund derived from the special tax, we cannot "think the legislature proposed rendering the bonds un- "salable or almost worthless in the hands of those who "might be so unfortunate as to hold them. * * *

"*Judgment reversed, with instructions to give judgment on the "demurrer to the return against the respondents.*"

At the following term, a year later, this decision was, as above stated, adhered to in the similar case, strongly resisted by Hon. Willard P. Hall.

Macon County Court *vs.* Huidekoper, 99 U. S., 592.

The other case of like title, decided at the same time per Chief Justice Waite (99 U. S., 582), relates to a special tax therein sought, in addition to both the one-twentieth of one per cent. and the one-half of one per cent. under the general statute. That case in nowise governs this case, as the former was before the statutes of 1879, above cited, and referred to as H, I, and J. These statutes have conferred a power, in the exercise whereof the one-half of one per cent. tax "for county purposes," as alleged and admitted to have been levied, had its authorization. The power which existed when the bonds were issued was the only power then existing and had been exercised, while in the present case it has not, and it is that subsisting power that is now sought to be enforced.

Four years later, in 1883, the subject was again presented

to the United States Supreme Court in four Knox county *mandamus* cases and the case of—

Macon [not Mason] County Court *vs.* Huidekoper, 109 U. S., 229.

If by possibility there was any doubt or ambiguity in the Clark County case, its force and effect was now restated and adhered to in decision of these five cases under submission.

Mr. Chief Justice WAITE delivered the opinion of the Court.

"In United States *vs.* County of Clark, 96 U. S., 211, it was "decided, at the October term, 1877, that bonds of the char- "acter of those involved in the present suits were debts of "the county, and that for any balance remaining due on "account of principal or interest after the application of the "proceeds of the tax of one-twentieth of one per cent. the "holders were entitled to payment out of the general funds "of the county. This, we all agree, means that the pay- "ment of this balance is demandable out of the funds "raised by taxation for the ordinary county uses. The "*mandamus* applied for in that case was one 'requir- "ing the county court and the justices thereof to di- "rect the clerk of the county to draw a warrant on the "county treasurer for the balance of the judgment remain- "ing unpaid, so that he might be enabled on its presenta- "tion to have it paid in its order out of the county treasury;' "and there was no fund out of which the payment could be "made, except that raised by taxation for ordinary county "uses. By the judgment of this court such a mandamus "was awarded."

Adherence to this and the Macon county decisions of former years was declared and judgments of affirmance consequently ordered.

In the light of these decisions plaintiff confidently avers that whatever stability there is in Federal jurisprudence can properly be invoked to sustain his position on this first point.

II.

The power which the respondent had when the bonds were issued, to levy one-half of one per cent. tax, on which the relator, by the decisions of the United States Supreme Court, had the right to rely for payment, still exists.

A—By presumption of law it entered into and became a constituent element of the contract made by Macon county in the issuance of its bonds, and any attempted repeal or modification thereof impairing the rights or remedies of the relator as bondholders would be in violation of the United States Constitution, and therefore null and void.

The construction of the constitutional provision, "No State shall pass any law impairing the obligation of contracts," has been clearly formulated by the United States Supreme Court. It said (per Matthews, J.) in Siebert *vs.* Lewis, 122 U. S., 284:

"It is well settled by the decisions of this Court that the "remedy subsisting in a State when and where the contract "is to be made and is to be performed is a part of its obliga- "tion, and any subsequent law of the State which so affects "that remedy as substantially to impair and lessen the value "of the contract is forbidden by the Constitution, and is "therefore void."

In McGahey *vs.* State of Virginia (135 U. S., 314), relative to State coupons, it is said (per Bradley, J.):

"It is well settled by the adjudications of this Court that "the obligation of a contract is impaired, in the sense of the "Constitution, by any act which prevents its enforcement "or which materially abridges the remedy for enforcing it "which existed at the time it was contracted and does not "supply an alternative remedy equally adequate and effica- "cious."

Citing—

Bronson *vs.* Kinzie, 1 How., 311.
Woodruff *vs.* Trapnall, 10 How., 190.
Furman *vs.* Nichol, 8 Wall., 44.
Walker *vs.* Whitehead, 16 Wall., 314.
Von Hoffman *vs.* Quincy, 4 Wall., 535.
Tennessee *vs.* Sneed, 96 U. S., 69.
Memphis *vs.* United States, 97 U. S., 293.
Memphis *vs.* Brown, 97 U. S., 300.
Howard *vs.* Bugbee, 24 How., 461.

In Murray *vs.* Charleston, 96 U. S., 432, 448 (per Strong, J.), it is said on this subject:

"There is no more important provision in the Federal "Constitution than the one which prohibits States from pass- "ing laws impairing the obligation of contracts, and it is "one of the highest duties of this Court to take care the pro- "hibition shall neither be evaded nor frittered away. Com- "plete effect must be given to it in all its spirit. The "inviolability of contracts and the duty of performing them "as made are foundations of all well-ordered society, and to "prevent the removal or disturbance of these foundations "was one of the great objects for which the Constitution was "framed."

Justice Bradley cited Von Hoffman *vs.* Quincy, 4 Wall., 314 (1867), which has been cited and affirmed a score of times in the last 25 years. The Court there held the repeal by act of legislature to levy a tax authorized by statute when the bonds were issued was invalid. "When a State has au- "thorized a municipal corporation to contract, and to exer- "cise the power of local taxation to the extent necessary to "meet its engagements, the power thus given cannot be with- "drawn until the contract is satisfied. The State and the "corporation in such cases are equally bound."

This case is cited from at length by Justice Field in—

Wolff *vs.* New Orleans, 103 U. S., 358 (1880).

This was a mandamus case to enforce judgment on bonds issued to a railroad, there being express statutory power to levy a special tax for payment of interest only, while the power to levy for the principal now involved was as follows (page 364, at bottom):

"When the bonds were issued upon which judgment was "recovered the city was by its charter invested with 'all the "powers, rights, privileges, and immunities incident to a "municipal corporation and necessary for the proper gov- "ernment of the same,' and it could have provided the "means by taxation for their payment when they became "due. Whatever the legislature empowers the corporation "to do is presumably for its benefit and may, 'in the proper "government of the same,' be done. Besides the power thus "existing at the time the bonds were issued, the act provid- "ing for their issue directed, as already stated, a special tax "to be levied each year to meet the annual interest on them. "Such being the case, the question is, whether the city has "been divested of its power by the act of 1876 which we "have mentioned."

And this question was answered in *the negative.*

In Memphis *vs.* United States, 97 U. S., 293 (1877), it was held that vested rights acquired by a creditor under and by virtue of a statute of a State granting new remedies or enlarging those which existed when the debt was contracted are beyond the reach of the legislature, and the repeal of the statute will not affect them.

The relator cites as specially in point—

Von Hoffman *vs.* Quincy, 4 Wall., 314.
Edwards *vs.* Kearzey, 96 U. S., 595.
Wolff *vs.* New Orleans, 103 U. S., 358.
McGahey *vs.* Virginia, 135 U. S., 693.

Surely the legal right which was decided by this Court to belong to the judgment creditors on Missouri and Mississippi

bonds to have recourse to the general fund could not be taken away or impaired by legislation.

The foregoing reasoning establishes by authority that such power exists, because it could not be legally repealed to relator's injury.

B. But no attempt has been made to effect such repeal.

No session act in the twenty-one years since the bonds were issued shows any *express repeal*, nor has the power been repealed by necessary implication.

Such repeals are looked upon by courts with disfavor. Inasmuch as the legislature has the power to clothe its acts and intents with language of its own selection, without leaving to inference or surmise what was designed to be enacted, laws once enacted and existing are presumed to continue until overthrown either by express abrogation thereof or by the enactment of such other provisions of law subsequently that the two cannot stand together. In that event the earlier must yield and become inoperative; but before courts pronounce such conclusions as against either public interests or private rights they must ascertain by full comparison of the respective enactments in view of their subject-matter and of their purview and effect that the legislative will by the last expression has overthrown and repealed the former act by *necessary* implication. This is horn-book law, but in support thereof the following citations are made:

State *ex rel.* Missouri and Mississippi R. R. Co. *vs.* Macon County Court, 41 Mo., 453.

Therein Judge Wagner, in deciding that the county of Macon must issue these bonds it had subscribed to said railroad, laid down the principle in the following terms (page 458):

"That there is no direct repeal is palpably evident, and "can only be impliedly repealed on account of inconsistency "or repugnancy. In the rules relating to repeals the same

"canons of construction apply equally to constitutions and "statutes. It may be conceded as settled doctrine that a "subsequent statute which is clearly repugnant to a prior "one, and which is so clearly inconsistent that the two can- "not stand together, necessarily repeals the former one, al- "though no express words of repeal are used; but it is "equally well settled that the law does not favor repeals by "implication. A later statute which is general and affirm- "ative does not abrogate a former which is particular, unless "negative words are used or unless the two acts are irrecon- "cilably inconsistent. It is a fair presumption that if a leg- "islature intend to repeal a statute they will do so in express "terms or by the use of words which are equivalent to an "express repeal, and a court will not, if it can consistently "be avoided, adjudge that a statute is repealed by implica- "tion."

This has been pronounced the most important decision in Missouri, and, of all litigants, Macon county should understand it. (See numerous citations of Judge Wagner.)

In Furman *vs.* Nichol, 8 Wall., 44, the principle was stated and adopted in a case from Texas.

In the light of these principles and authorities let us examine the legislation of Missouri to find from what it can be contended that said power existing in 1870 has been *impliedly* repealed as to existing rights of creditors.

It is not so affected by the constitution of 1875, but, on the contrary, the only prohibitions and limitations therein contained are made expressly subject to a proviso saving all such existing powers "*to pay valid indebtedness now existing.*"

G, *supra*, article X, sec. 11, Rev. St. 1889, p. 97.

Pursuant thereto the legislature enacted, in 1879 (I, *supra*, sec. 7662, Rev. St. 1889):

"For county purposes the annual tax on property, *not* "*including taxes for the payment of valid bonded indebted-* "*ness* or renewal bonds issued in lieu thereof, shall not in "any county in this State exceed the rates herein speci- "fied. In counties having six million dollars or less said

" rates shall not exceed fifty cents on the hundred dollars " valuation. In counties having six million dollars and " less than ten million said rate shall not exceed forty cents " on the hundred dollars valuation." * * *

Thereby evidently the legislature, in enacting these limitations, has expressly followed the proviso of the constitution in excepting therefrom " taxes for the payment of valid bonded indebtedness." Hence the relator contends that there was express reservation of all his existing rights as a bondholder. He claims all these existing rights, and, moreover, that there was no attempted interference or repeal thereof, but even an express reservation for his protection.

Contemporaneously with said last-named section we find enacted H, *supra* (sec. 7563, Rev. St. 1889), occupying the first place under the head " County revenue," viz:

" The following-named taxes shall hereafter be assessed, " levied, and collected in the several counties in this State, " and only in the manner and not to exceed the rates pre- " scribed by the constitution and laws of this State, viz., the " State tax and the tax necessary to pay the funded or bonded " debt of the State, *the tax for current county expenditures*, and " for schools."

Section 7564, Rev. St. 1889:

" No other tax for any purpose shall be assessed, levied, or " collected, except under the following limitations and con- " ditions, viz:" upon approval of the circuit court, upon application by prosecuting attorney, &c.

In these sections is found no basis for the contention of repeal of said power to levy the tax not exceeding one-half of one per cent. to defray the expenses of the county.

From the omission of the section of the general statutes as amended, which conferred this power, from the Revised Statutes of 1879, it cannot be held that therefore said section was repealed.

Whatever may have been the views of the committee of

revision, their conclusion as to the repugnancy of said prior statute to the acts passed at the session of 1879 is not final or binding upon this Court. Said prior statutes not having been expressly—*i. e.*, in terms of specific designation—repealed, it is upon the ground of repugnancy alone that they ceased to be law. But, placing the provisions side by side and comparing them, no repugnancy is found. Certainly there is no presumption in favor thereof; but, on the contrary, the strong legal presumption is in favor of upholding, not of overthrowing, a statute duly enacted. The subject-matter, it is true, is the same, viz., "county revenue," and section 6798 of Revised Statutes 1879 relates to "taxes—how assessed, levied, and collected;" and the next section, 6799, relates to "procedure, limitations, and conditions." This is all right if the legislature saw fit so to enact, but in the first of those sections there occurs a reference to "the rates prescribed by the constitution and laws of this State," and in the sections of the constitution and laws relating to such rates we have already seen above that express provisos and reservations are found relative to "taxes to pay valid bonded indebtedness now existing" and "taxes for the payment of valid bonded indebtedness." And said section 6798 provides how certain taxes enumerated and specified shall from thenceforward be assessed, levied, and collected within the limitations of the constitution and the statute made conformably thereto. It does not by any negative word intimate that those shall constitute the only taxes—that there shall be none other; but, on the contrary, the next section (6799) proceeds to provide how and under what future limitations and conditions the still other taxes shall be levied. This last section is negative; the former is affirmative. But the negation of the latter is in no sense a repeal of—in no sense repugnant to the existence and continuance of other taxes of divers sorts for benefit of creditors. On the contrary, the very prohibition of their levy other than under certain limitations and conditions directly implies

their continuance and not their repeal. And the next section (6800) by its closing paragraph, viz: "And the method "herein provided for the assessment, levy, and collection "of any tax or taxes not enumerated and specified in section "6798 shall be the only method known to the law whereby "such tax or taxes may be assessed or collected or ordered "to be assessed, levied or collected," shows clearly that it was the legislative intent not to abrogate all other taxes than those specified in section 6798, but to regulate the same, whatever they might be.

The point now under consideration is not as to the force or validity of such regulation, but as to whether a tax antecedently authorized and then still sanctioned was by the legislature of 1879 abrogated and repealed. The negative answer must surely be given.

In Cape Girardeau County Court *vs.* Hill, 118 U. S., 72, this Court passed on a similar claim that a Missouri statute of 1871 had been repealed by the revision of 1879. The conclusion was that, as there was no express repeal and no such repugnancy to the new enactments as to constitute a necessary implication, the statute of 1871 still stood and should be enforced, notwithstanding its suppression and omission from the revision of 1879. *Vide* opinion by Justice Harlan. Such precisely is the present contention of the relator and surely the like result alone is attainable.

On this analysis and examination of statutes in the light of principle and authority, it is hard to conceive of doubt remaining as to whether the legislature either attempted to repeal said power of taxation, or, if it so attempted, whether it could have done so effectually.

A specious argument may, however, be advanced as follows: That section 6798 had the effect to abrogate the formerly existing power to levy a tax, not to exceed one-half of one per cent., to defray expenses by enacting another power to levy a tax which would escape the inhibition of

the United States Constitution by substituting another remedy equally adequate and efficacious.

Firstly. The Revised Statutes neither expressly nor by necessary implication through repugnancy repeal the power of taxation contended for. And there is no expression of purpose or intent to substitute the new provisions for the old. Such substitution or abrogation, or whatever term may be used, would be no more nor less than *repeal*, which is the simple unambiguous word for the same thing.

Secondly. If such "substitution" be conceded the new remedy attempted to be given is not equally adequate and efficacious.

The consideration hereof *requires* a re-examination of the above-cited statutes existing in 1869 and 1870 and enacted in 1879.

In 1869–'70 respondent had power—

1. To levy a one-half of one per cent. tax for expenses. *Supra*, A, B, C.

2. To levy a tax for poor. *Supra*, D.

3. To levy a tax for bridges. *Supra*, E.

4. To levy a forty-cent tax for roads. *Supra*, F.

Relator, as judgment creditor on Missouri and Mississippi railroad bonds, had, according to the repeated decisions of this Court, a right of recourse to the tax for expenses for his payment. He can claim nought from the other three taxes.

But to repeal these express powers existing at the time the bonds were issued and to throw the expense of these three public requirements on the general fund for expenses, and to which relator had right of recourse, impairs his remedy. These three great and expensive objects in the public

interest were duly protected by powers to levy special taxes therefor. The power for roads was limited only to 40 cents on the $100, while the other two powers were limited only by necessity and discretion. Other necessary expenses of county administration (including payment of just debts as decided by the U. S. Supreme Court) were payable out of the general fund derivable from the one-half of one per cent. tax. These expenses were:

1. Salaries of county officials.
2. Fees of grand and petit jurors.
3. Expenses of public elections.
4. Incidentals, as fuel, stationery, &c., &c.

No question is new presented as to the administration of these general funds or how or in what proportion relator could share therein. The law empowered the creation of such funds by the levy of one-half of one per cent. tax. The U. S. Supreme Court has established relator's right of recourse thereto for payment. Such was his right and remedy existing in 1870, and he could have protected the same, if necessary, by injunction against misappropriation or diversion of said fund to said other purposes for which, as above shown, other powers of taxation had been specifically granted. Were it otherwise the burden of the roads (which by the statute might be forty cents on the $100) and the burdens of bridges and poor-house and poor (which the statutes had left discretionary) might easily absorb and consume the whole of the general funds for any year or series of years. What, then, would become of relator's remedy as it had been judicially established?

No; the proposition simply is that relator had the right to look to the general fund as authorized and existing in 1870, and that right forbade the extinguishment of that fund, either in whole or part, or the diversion of it to other objects than those contemplated by law when the bonds were issued.

Next let us consider what remedy is assured to the relator

as bondholder by the legislation of 1879, under the theory that those statutes have worked a substitution of remedy, supplying one equally adequate and efficacious.

By H, *supra* (R. S., sec. 7689) authority is given to levy a "tax for current county expenditures" "in the manner and not to exceed the rates prescribed by the constitution and laws of this State." Reference to section 11 of article 10 of the constitution shows that the limitation in counties having six million dollars and under ten million dollars (which is the case with Macon county at present, in 1892) is forty cents on the $100, and said restriction applies to taxes of every kind and description, whether general or special. Reference to section 6807 (R. S., 1879) shows that the limit established by the legislature corresponds to the constitution: "In counties having six million dollars and less than ten million, said rate shall not exceed forty cents on the $100 valuation."

Reference to section 6950 shows that instead of the power to levy a special road tax to extent of 40 cents (as was the case in 1870) the limit is now set at 20 cents, and this tax must, under the terms of the constitution, be embraced and included in the 40 cent tax for county purposes. (G, *supra.*)

This is patent from reading the constitution, and has been so decided, with approval of the supreme court of Missouri, in a tax-injunction case.

Arnold *vs.* Hawkins, 95 Mo., 569.

So examination of sections 4323, 6586, 6590 (R. S. 1879) shows that the expense of bridges and of poor are now expressly thrown upon the general revenue fund of the county.

The result of this investigation thus shows that by the Revised Statutes of 1879 Macon county was formerly expressly limited in its power of taxation for county purposes to 50 cents on the $100, and that to the fund thereby created the cost of poor, bridges, and roads are made chargeable; while by constitution (*supra* I) and statute (*supra* I) the limitation is to vary with increase of taxable wealth.

To contend that the relator has right of recourse to the general fund created by such levy of 50 cents when that fund is chargeable, as it now is, with the additional burdens of providing for roads, bridges, and poor, and that the remedy of the relator thereby created and substituted is a remedy as adequate and efficacious as the relator had when the general fund was created by a tax of 50 cents, and was not chargeable with said additional burdens, is simply *absurd*.

Hence the facts do not sustain the theory of legislative substitution of an equally adequate and efficacious remedy.

IN CONCLUSION.

Hence the relator asks this Court to enforce on his behalf, for the payment of his judgment, the power invested in Macon county, to be exercised through the respondent, its county court, to levy taxes which existed in 1869 and 1870, when his bonds were issued. As has been hereinbefore demonstrated, relator had recourse to the general fund arising from the levy of one-half of one per cent. tax. That power could not be repealed. Its repeal has never been attempted. On the contrary, that power has, by the reservations of the constitution of 1875 and the Revised Statutes, enacted conformably thereto, been expressly saved from any adverse action.

Nay more; the relator goes further and maintains it was in the interest of law and order, the upholding of honest dealing and municipal credit, that the legislature enacted the Revised Statutes that have been above quoted and considered. Considerable has been said relative to impairment of contracts and the impossibility thereof; yet we have seen that there was no such action attempted, expressly or impliedly, by the new constitution nor by the legislature in any enactment since. No; that body, jealous as it has ever been of the honor and integrity and credit of the State and her subor-

dinate municipalities, and anxious to promote public improvements and attract capital and immigration, took a correct view of the situation in 1879. During the preceding years of panic and depression there had been much litigation over the public securities, and principles of law had been clearly and forcibly enunciated as to the inviolability of contracts and the validity of municipal bonds. The object of the framers of the new constitution, as also of the law-makers of 1879, was to avoid the appearance even of impairment of vested rights or remedies. While no attempt was made to create new rights or remedies, the design was to leave the creditors all they then had.

In this same spirit the legislature of 1879, finding that as the statutes then stood the several counties throughout the State were invested with a power to tax to the extent of one-half of one per cent., and in addition thereto had had power to levy to a large amount for roads and bridges, and that the power to levy for the support of the poor had been given without limitation, and finding that by the express requirement of the new constitution all taxes of every kind and description, whether general or special (except taxes to pay valid indebtedness then existing), must be comprised within prescribed limits, undertook the work of revision incumbent upon it.

It said in effect, "As to creditors of our various municipalities, we leave them all the rights and remedies they now have. As to counties, we will create a new power of taxation, with limitations conforming to the new constitution, and in so doing the amounts must be adapted to their respective valuations, and all taxes, of every kind and description, whether general or special (except as to creditors), must be combined; so we will repeal the power to levy for the poor and make that item come out of the new tax for county purposes. This will establish a new fiscal system, and we will throw safeguards around the public interests that the funds

we now authorize for governmental purposes shall be confined thereto without diversion.

But as to the debts which some only of our counties, cities, and towns have upon them, we are bound in honesty and good faith, as well as by the inhibition of the United States Constitution, to leave to them unimpaired all their rights and remedies. These debts are of very divers sorts and amounts. We can make no discrimination or distinction, and we can settle nothing and can properly do nothing in regard to them. All questions pertaining thereto are of a judicial character, not legislative. They must be settled and enforced by the courts of the land. Thus it was as to straight county bonds, township bonds, strip bonds, drainage bonds, city bonds, town bonds, and school bonds. No distinction or discrimination or decision as to powers, validity, rights, or remedies will be attempted."

The United States Supreme Court had, within the four years since the adoption of the new constitution, passed on many of these securities *pro* and *con*. Decisions had been announced affecting certain counties, among which were Macon, Clark, and Knox, establishing and reaffirming the proposition that the holders of Missouri and Mississippi railroad bonds had right of payment out of the general fund of the county, as it had theretofore and then still existed, under the power to levy one-half of one per cent. tax. This was probably known to many of the legislature, and, accepting loyally to law and order the final conclusions of this ultimate tribunal, the course of legislation went forward unswervingly in the interest of honest payment of debts and upholding the public credit. The action was taken by the legislature in pursuance of its duty to create a code of Revised Statutes, general in character, operative throughout the whole Commonwealth. The presumption of law is, if any is needed, that honesty was the actuating motive. Accordingly, the Revised Statutes of 1879 were enacted with

the provisions relative to county revenue hereinbefore presented and discussed. The direct effect thereof was, as has been shown, to create, *de novo*, a fiscal system in the public interest for carrying on the operations of government, and, secondly, to leave creditors the rights and remedies existing unimpaired in form or in substance.

The inevitable consequence of this was that Macon county can, as she does go forward in the administration of her public affairs with adequate provision for revenue, with collision of public interests and private right wholly avoided, and the relator as judgment creditor is entitled to have the county fulfill her duty by levy of the tax adequate to pay his judgment.

Is it objected that the Missouri legislature did not intend any such results; it did not intend there should remain any power to tax beyond that prescribed and limited by the constitution and the revision? That the legislature meant to repeal the power existing in 1870 and substitute naught therefor? "No; it meant to substitute the new power to tax, but not to let the Missouri and Mississippi railroad bondholders share therein. The new tax was not for creditors; they were to be carefully shut out."

This is an imputation upon the legislature to be repelled as inconsistent with justice and common honesty, as tending in effect to nullify the adjudications of the United States Supreme Court and render its Federal judgments fruitless. That such action could not be effective is patent, but, we insist, it was not attempted. All that has herein been said upon the axioms of Federal jurisprudence have been done for a clearer apprehension of the true force and effect of the Missouri legislation of 1879 as bearing on the rights and remedies of the relator. It is a dictate of common sense as well as of the highest propriety, that in giving effect to any act, whether it be of private citizens or the most powerful nation, when two constructions are capable of being given, the one consonant with integrity, honesty, and right, and

the other with fraud, deceit, and repudiation of just debts, there is no room for parley. Of course, the former must be accepted. This principle admits of no doubt, and it finds direct application to the case at bar.

Upon the levy under the present Revised Statutes the functions of government are designed to be maintained, and the relator seeks not to interfere therewith. *Salus populi suprema lex.* Yet this maxim is ever consistent with the principle that the highest welfare of any community can only be promoted by a course of due honesty and integrity in the discharge of its obligations and payment of its debts. The way is clear for respondent to do both. The duty is incumbent, and upon express demand made by relator it was refused.

Whereupon this Court is asked to hold that the respondent had legal authority to levy a tax to pay the plaintiff's judgment, and that the court below erred in refusing its peremptory writ of mandamus.

JOSEPH SHIPPEN,
Of Counsel for Plaintiff in Error.

JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

Term No. 1057.

THE UNITED STATES ex rel. JOSEPH E. JONES,
Plaintiff in Error,

vs.

THE COUNTY COURT OF MACON COUNTY AND
THE JUDGES THEREOF, Defendants in Error.

Suggestions in Reply to the Brief of Mr. Bledsoe.

BEN ELI GUTHRIE,
For Defendants in Error.

In the Supreme Court of the United States.

October Term, 1891.

Term No. 257.

THE UNITED STATES EX REL. JOSEPH E. JONES,
PLAINTIFF IN ERROR,
vs.
THE COUNTY COURT OF MACON COUNTY AND THE JUDGES THEREOF, DEFENDANTS IN ERROR.

Some Suggestions in Reply to the Additional Brief of Mr. Thomas K. Skinker.

REPLY TO MR. SKINKER.

I.

1. This is not an application under section 76, Gen. Stats., 1865, page 121. And that section and its subsequent amendments can have no importance in this controversy. Relator's recovery must rest upon the allegations of his information and writ.

See authorities under point VII, page 26, of respondent's brief.

That section is not referred to in any of the pleadings, not even in relator's answer to the return. The answer refers to section 165, page 1193, 2 Wagner's Statutes, 1872; which section, according to relator's counsel, is quite another statute from section 76, p. 121, Gen. Statutes, 1865. See page 9 of Mr. Skinker's brief.

2. It is respectfully submitted that section 1, page 157, acts 1867, set out on page 7 of Mr. Skinker's brief, is an amendment of section 7, page 96, Gen. Stat. 1865, set out on pages 6 and 7 of that brief, reducing the rate of taxation for revenue purposes. Both enactments use the same, or similar verbiage. One says "Annual Tax;" the other "Annual Taxation."

Section 7 was evidently imposing a tax for revenue, and can with propriety only be called a revenue tax.

Section 1, page 168, acts 1867, set out on page 7 of Mr. Skinker's brief, clearly institutes a new tax, creates a different fund, names it by calling it the "State Interest Fund," and applies it to paying interest on the State debt. It plainly says its enactment is in pursuance and for the enforcement of the ordinance of the Convention of 1865.

It is a new law proceeding from a distinct and adequate cause, and having a new and definite purpose.

The floating debt of the State growing out of the war has been audited and funded, and the payment of said debt and its interest must be provided for as was strictly enjoined upon the legislature by the ordinance referred to. Consequently we find a new phraseology and a new verbiage, such as "four-tenths of one per cent.," instead of "forty cents on the hundred dollars."

During the war the State seems to have issued what is called Union Military Bonds, and provided for their payment by a special tax and fund, Laws of Missouri, 1865, pages 59, 61 and 62; consequently section 7, page 96, Gen. Stat., 1865, excludes that fund from the revenue rates mentioned in it. This exclusion would seem proof positive that the rates therein contained were wholly revenue rates.

But the revenue act of 1867 makes no mention of this "Union Military Fund," as the State interest fund evidently took care of those bonds.

Moreover, the second section of that act shows the necessity for the new enactment and the creation of the new fund. Prior to the war the State had become endorser and guar-

antor for some $30,000,000 of bonds issued by the railroads of the State. The roads had paid their interest up to 1861 and then defaulted thereon. During the war the State did nothing to meet its endorsement. After the close of the war the roads continued in default, until in 1867 the State, to make good its guaranty, levied the tax provided for in this act. This fact goes largely to explain why that fund raised thereby should be called the "State interest fund." It was to take care of and pay the defaulted interest for seven years on this large amount of railroad bonds and to keep it paid in the future.

By consulting the ordinance of 1865 "for the payment of State and railroad indebtedness," which became a part of the constitution of 1865, it will be seen that the tax to pay this very indebtedness mentioned in the act of March 12, 1867, Laws of Missouri, 1867, page 168, was directed to be levied upon the railroads themselves. General Statutes of Missouri, 1865, page 53.

The railroad companies neglected to pay the tax or the interest, and were sold and forfeited to the State under Section IV of the ordinance in pursuance of the following acts of the General Assembly:

Laws of Missouri, 1866, pages 107 and 115.

Hence the necessity of creating a tax to supply interest fund.

But it appears that the State interest was in existence at the time and had never been replenished from the revenue fund. Chapter 14, page 133, General Statutes, 1865, furnishes the history of that fund, and it shows the sources from which it was derived, to wit, the railroads. Then it must follow that the State interest fund tax of 1867 was an entirely distinct tax from the State revenue tax.

3. Though prior to the two acts of March 12, 1867, the legislature could or even, in fact, did appropriate money out of the fund arising from the tax provided for by section 7, page 86, Gen. Stat., such power or act could not and did not

make such fund any less a revenue tax or fund. A revenue fund is a general fund, which the legislature can use to meet all the legitimate demands against the State. Had the "interest fund" been insufficient to meet the interest on the State debt, who will gainsay the power of the legislature to have appropriated money out of the revenue fund provided for by the act of March 12, 1867? And had they done so would such act have converted the revenue fund into an "interest fund?" Clearly not. And though State interest for 1866 might have been paid out of that fund it would be still a revenue fund, pure and simple.

Section 7 was only in force from August 1, 1866, to March 12, 1867—six months and twelve days.

So, then, it must follow that on April 2, 1867, section 76, page 121, Gen. Stats. 1865, providing that the county tax shall not exceed the State tax more than one hundred per centum, referred to section 1, page 157, acts of 1867, and meant that the county tax could not exceed fifty cents on the one hundred dollars.

4. But the verbiage of sections 7 and 76 of the general revenue law of the statutes of 1865 is that of the old statutes in vogue long before these questions arose, and clearly relates to the State revenue and not to State interest fund.

5. But it is admitted that at the time of the second subscription the limit for county revenue was fifty cents on the one hundred dollars. The return admits that $1,050 of the judgment was on bonds issued under the first subscription. The relator's original petition states that these bonds were issued February 1, 1869. See pages 5 and 6 of Appendix A to respondent's brief and page 5 of relator's brief.

It is clear that at this time the rate for county purposes did not exceed 50 cents on $100.

6. But relator nowhere in his pleadings claims that he is entitled to a levy under the general county revenue statute

to pay this $1,050 of his judgment. The mandate of his writ is to pay the whole judgment, not a part of it. The peremptory must follow the alternative writ and not depart from it. See authorities under point XIX, page 40, of respondent's brief.

Besides this tax is an *annual* tax, and the writ should show for what years relator requires his tax to be assessed.

The taxpayer has a right to know for what years he is paying taxes under this statute. *This is an important right.* Without the tax-books and receipts show the year for which taxes are paid what protection has the taxpayer? He may be compelled to pay over and over again without end for the same year.

The county court must know for what year such taxes are to be levied in order that they may make a legal levy and proper orders to carry it into effect.

It is respectfully submitted that this suggestion is worthy of the greatest consideration.

7. But these matters have been in active litigation since 1874, the date of the Shortridge case, in 56 Mo., 126, where the ablest counsel in the State represented the relator, Judge Napton, who had spent a large part of a long life on the State supreme bench and was as familiar with the legislation of the State and its rules of decision as the child with its alphabet. The bonds in controversy in that case were of the first issue. The Huidekoper case, in 99 U. S., 582, was decided in 1879. The Walker case, in 68 Mo., 29, was handed down in 1878. The other cases cited in respondent's brief have been from time to time delivered in State and Federal courts.

In the Huidekoper case, 134 U. S., 332, these very statutes and many others were in the special finding of facts and were in the court below and before this Court, as record and briefs in that case will fully show. All the courts in all these cases have uniformly held that 50 cents on $100 valuation was the limit of taxation for county purposes at the time of both

these subscriptions. Certainly, if anything is fixed, this limit is.

8. Section 1, page 81, acts 1869, set out on page 8 of Mr. Skinker's brief, is a simple consolidation of the two acts of March, 1867, recognizing the distinct sources and objects of both acts; and the only fair and legitimate conclusion from all the acts is that the "State interest fund" provided for in 1867 was an innovation in the revenue laws of the State.

These rates have been changed from time to time as in the judgment of the legislature the exigences of the State required; but it has and still continues to be the same law.

It is not necessary here to go into the effect of these changes of rates, as it is clear that at the time of first subscription, April 2, 1867, the rate for State revenue tax was 25 cents on $100 valuation, making the county rate 50 cents on the $100, which the county has always levied.

II.

There has been no repeal of the preceding statutes in the sense so ingeniously and fallaciously contended for by counsel.

1. Sections 7653 and 7662, Revised Statutes, 1889, being carried forward from the revision of 1879, sections —— and 6807, page 1337, are merely continuations of section 76, Gen. Stat., 1865, the act of January, 1868, and the act of 1872. These are such mere formal and verbal changes as to conform them to the constitution of 1875. The substance and spirit remain the same. They are in fact the same. They create no new tax. It is the *same old county expense tax.* They do not divert to a new or different purpose. It stands devoted to the *same old uses*, fulfilling the *same old purposes*, and meeting the *same old ends.* It is to pay expenses, *plus debt* or *plus anything else* that could be legally charged on the old county revenues. "Only this and nothing more."

So long as the rate is that required, it is county revenue, as it has ever been, but any excess over that must be "for payment of valid bonded indebtedness."

On these questions we call attention to the case of the United States *ex rel* Samuel C. Davis *vs.* Knox County *et al.* contained in Appendix "B" to respondent's brief, wherein these points were in June last, raised before Judge Thayer who discussed them clearly and cogently and, it would appear, invincibly on both reason and authority.

2. Mr. Skinker contends that there are certain charges for roads, bridges, poor-houses now cast upon this county fund that were not before cast upon it, but might have a special tax of their own.

But what has that to do with case? Do the pleadings make any complaint about these matters? *None; none whatever.*

But the road and bridge laws are much the same now on the tax question as then. 2 Revised Statutes, 1879, page 1368, section 6950, and page 855.

The special road tax was and has always been payable in work, though the taxpayer could commute by paying money. See section 29, page 154, acts 1868, this being the act from which counsel cites section 27 on page 18 of his brief.

Roads, bridges, and the support of the poor have always been county charges. Have always been met out of the general revenues of the county. They constitute a part of "*the expenses,*" to defray which the county courts were authorized by section 76, of General Statutes 1865, to levy 50 cents on $100.

If such question could possibly arise on this record, it could be dceided in no other way. In the fifty years of their existence the county courts have pursued no other course, attempted no other construction. The fact that they might and did doubtless sometimes apportion them at the time of making the levy, did not the less make them charges on the revenue fund. As well say the asylum tax or fund was not a

charge on the revenue. There are some very stringent provisions in that law.

See sections 25, 26, 27, 30, 39, Gen. Stats., 1865, pages 308, 309 and 310.

If roads, bridges, and the poor are to be excluded, what would be left for the 50 cents on $100 to discharge. These three items are the three most important and most expensive charges and functions of the county. As well exclude jury fees and witnesses' fees, because the court could carry such matters out in a separate column of the tax-book if it so pleased.

But there are no such issues in this case. This court will not go out of the record to try some other matter or case that may or may not come before them in the near or remote future. In this case the court can try only such matters as arise on the record. It can not and will not try every question that counsel may be pleased to put in their briefs. It will confine itself to the questions that came before the court below and pass by issues which the zeal of counsel may wish to inject into it.

3. The contention that the Constitution by section 17, article 10, authorizes any such construction of section 7653 and 7662, is wholly without merit. See point XXV, in respondent's brief, and Judge Theyer's opinion in Davis case in appendix "B" to brief.

4. The Huidekoper cases, 99 U. S., 592, and 134 U. S., 332, *do most fatally militate against relator's contention as to the construction of these statutes.*

In the former it was settled that the only special tax the bondholder was entitled to was the 1-20 of one per cent.

The latter decides that the bondholder is entitled to have levied ½ of one per cent. for county revenue and no more. All these statutes here drawn in question were in the special finding of facts in that case, and were before the court below and above.

The opinion is grounded on the fact that section 6807, 2

Revised Statutes, 1879, page 1337, carried forward in *haec verba* into the revision of 1889, as section 7662, authorized a county tax of fifty cents on the hundred dollars, the same as the county revenue law in 1867 and 1870.

Attention is respectfully called to the annexed statutes.

BEN ELI GUTHRIE,
Of Counsel.

STATUTES INVOLVED.

STATE INTEREST FUND.

Section 1. All taxes from railroads, levied and collected under the provisions of the "ordinance for the payment of the State and railroad indebtedness," adopted by the people on June 6th, 1865, and all proceeds from the sale of railroads, and also the tax provided for in section 6 of the ordinance afore cited, together with all other payments from whatever source, heretofore by law provided to be made into the State interest fund, shall be paid into the treasury to the credit of the State interest fund; and this fund shall be set apart by the treasurer, and it is hereby pledged for the payment of the interest and the redemption of the bonds of the consolidated railroad indebtedness of the State of Missouri, and for this purpose only.

General Statistics, 1865, pages 133-4.

The remaining sections provide for the administration of the fund, its sources, and shows its independence and distinctness from the revenue fund provided for by section 7, page 96.

The act of March 12, 1867, the first section of which is printed in Mr. Strinker's brief, proceeds as follows:

Section 2. That all moneys that may be received by the State of Missouri from the United States Government under the provisions of the act of Congress entitled "An act to reimburse the State of Missouri for moneys expended for the United States in enrolling, equiping, and provisioning the militia forces to and in suppressing the rebellion," etc., * * * shall by order of the governor be placed as fast as received from the United States on deposit in the National Bank of Commerce in New York to the credit of the State of Missouri, and the commissioners of the State interest fund shall direct

said money to be paid out by said bank upon the overdue coupons of the bonds issued or guaranteed by the State in aid of railroads * * * as fast as received, which coupons shall be paid in the order in which they matured, commencing with those that matured on the first day of July, eighteen hundred and sixty-one; but whenever there is money enough received from the source aforesaid to pay more than one series of coupons, then payment shall be made of other coupons in the order in which they matured to the extent of the money so received.

Section 3 provides for the funding of all unpaid coupons remaining after said government fund is exhausted.

Section 4. There is hereby appropriated out of any money in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars to the credit of the State interest fund to be applied to the payment of the interest maturing on the first day of July, 1867, upon the outstanding State and guaranteed bonds issued or guaranteed in aid of railroads, etc.

Section 5. That out of the State interest fund, arising from the taxes herein ordered to be levied and assessed, and from other sources, etc., the commissioners of the State interest fund shall pay the interest coupons upon all the State or guaranteed bonds of this State, which coupons become due and payable on the first day of January, 1868, and shall continue to pay from said funds * * * the accruing semi-annual interest upon State and guaranteed bonds as such interest becomes due.

Section 6 provides for a temporary loan to pay the accruing interests on bonds in case the interest fund should prove insufficient.

Section 7 provides for proper accounts by the commissioners and others.

Section 8 puts the act in force from its passage.

Laws of Missouri, 167, pages 168, 169, 170.

STATE REVENUE.

Sec. 5. The annual tax levied upon all subjects of taxation shall be at the following rates: First, on all free male persons over twenty-one and under fifty-five years of age, thirty-seven and one-half cents; second, on land and town lots, including the houses and improvements thereon and all-

other property, real and personal, now made taxable by law, one-fifth part of one per centum of the assessed value thereof.

2 Revised Statutes of 1855, page 1324–5.

This section is reprinted here to show that the formula is the same as that in Gen. Stat. 1865. It seems to be an old formula handed down from revision to revision.

UNION MILITARY FUND.

Section 5. Said bonds shall be receivable for all taxes, assessments, dues, fines, or other liabilities, which may be levied, assessed, or collected for the purpose of paying the militia forces of this State by this act or any other act.

Section 9. A fund is hereby created which shall be denominated the "Union Military Fund," and shall consist of all monies that may come into the treasury of the State from appropriations by the Congress of the United States to the State of Missouri, for the purpose of paying the military forces thereof, or for indemnity for expenses incurred in suppressing the rebellion, or by loan for that purpose; and all taxes, dues, assessments, fines, and other liabilities that may be levied, assessed and collected for, or may be due or coming to, said State, by virtue of this or any other act for the special purpose of paying the militia; and this fund shall be and is pledged for the payment and redemption of all the bonds, principal and interest, which may be issued under this act, and shall be set apart by the treasurer for that purpose only, and paid out under its provisions.

Laws of Missouri, 1863, pages 27 and 28.

ROADS.

Sec. 29. Persons subject to pay such road tax shall have the right, at their election, to pay the same in money or labor, upon their proper districts, at a rate not exceeding one dollar and fifty cents per day for each road hand, at such time and place as they shall be notified by their overseer so to do; and upon failure to attend as other hands, or to send a substitute acceptable to the road overseer, properly prepared to labor, shall be deemed to have elected to pay the tax.

Laws of Missouri, 1868.

Section 7814. The county courts of the several counties shall at the May term thereof in each year levy upon real and personal property made taxable by law a tax of not less than five nor more than twenty cents on the one hundred dollars, which levy shall be collected as other State and county taxes, etc.

2 Revised Statutes, 1889, page 1818.

This section is brought up from the revision of 1879, Section 6950, p. 1368. The only substantial difference between it and the law of 1868 is the reduction of the rate.

Road taxes, it seems, were never levied on the inhabitants of incorporated cities, towns, and villages, as they paid their road taxes in street assessments to the corporate authorities.

BRIDGES.

On page 18 of Mr. Skinker's brief is set out section 13, page 298, of General Statutes, 1865. This section will be found in *haec verba* in 2 Revised Statutes, 1879, page 857, section 4323; and also in 1 Revised Statutes, 1889, page 288, section 912. It has always been the law of the State. Besides the whole bridge law now is substantially the same as in 1865.

SUPPORT OF THE POOR.

The existing provision for the support of the poor will be found in 2 Revised Statutes, 1879; Carpenter, 140, page 1289, and 2 Revised Statutes, 1889, chapter 129, page 1764, and they remain substantially the same. Section 8 quoted by counsel, having been consolidated with section 12, also quoted, so that it reads:

Section 7334 (in 1889). Such county court may cause to be erected on the land so purchased or leased a convenient poor-house, or houses, and cause other necessary labor to be done and repairs and improvements made, and may appropriate from the revenues of their respective counties such sums as will be sufficient to pay the purchase-money, in one or more payments, to improve the same and to defray the necessary expenses.